

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

J. DOE 1 AND J. DOE 2,  
INDIVIDUALLY AND ON BEHALF OF  
ALL OTHERS SIMILARLY SITUATED,  
  
PLAINTIFFS,

CASE NO. CV-22-06823 JST  
OAKLAND, CALIFORNIA

MAY 4, 2023

V.

PAGES 1 - 53

GITHUB, INC., A DELAWARE  
CORPORATION; MICROSOFT  
CORPORATION, A WASHINGTON  
CORPORATION; OPENAI, INC., A  
DELAWARE NONPROFIT CORPORATION;  
OPENAI, L.P., A DELAWARE  
LIMITED PARTNERSHIP; OPENAI GP,  
L.L.C., A DELAWARE LIMITED  
LIABILITY COMPANY; OPENAI  
STARTUP FUND GP I, L.L.C., A  
DELAWARE LIMITED LIABILITY  
COMPANY; OPENAI STARTUP  
FUND I, L.P., A DELAWARE  
LIMITED PARTNERSHIP;  
OPENAI STARTUP FUND MANAGEMENT,  
LLC, A DELAWARE LIMITED  
LIABILITY COMPANY,

DEFENDANTS.

TRANSCRIPT OF ZOOM PROCEEDINGS  
BEFORE THE HONORABLE JON S. TIGAR  
UNITED STATES DISTRICT JUDGE

(APPEARANCES CONTINUED ON THE NEXT PAGE.)

OFFICIAL COURT REPORTER: IRENE L. RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074

PROCEEDINGS RECORDED BY MECHANICAL STENOGRAPHY,  
TRANSCRIPT PRODUCED WITH COMPUTER.

1        A P P E A R A N C E S: (CONT'D)

2        FOR THE PLAINTIFFS:

MATTHEW BUTTERICK  
BY: MATTHEW BUTTERICK  
1920 HILLHURST AVENUE #406  
LOS ANGELES, CALIFORNIA  
90027

5        JOSEPH SAVERI LAW FIRM, LLP  
6        BY: JOSEPH R. SAVERI  
7        CHRISTOPHER KAR-LUN YOUNG  
8        TRAVIS L. MANFREDI  
9        601 CALIFORNIA STREET, SUITE 1000  
10       SAN FRANCISCO, CALIFORNIA 94108

11       FOR DEFENDANT GITHUB  
12       AND MICROSOFT:

ORRICK, HERRINGTON & SUTCLIFFE  
BY: ANNETTE L. HURST  
405 HOWARD STREET  
SAN FRANCISCO, CALIFORNIA 94105

13       FOR DEFENDANT OPENAI:

MORRISON & FOERSTER LLP  
BY: JOSEPH C. GRATZ  
425 MARKET STREET  
SAN FRANCISCO, CALIFORNIA 94105

24  
25

OAKLAND, CALIFORNIA

MAY 4, 2023

P R O C E E D I N G S

(COURT CONVENED AT 2:06 P.M.)

THE CLERK: YOUR HONOR, NOW CALLING CIVIL MATTER  
22-6823, DOE 1, ET AL., V. GITHUB, INC., ET AL.

IF COUNSEL COULD PLEASE STATE THEIR APPEARANCES FOR THE  
RECORD STARTING WITH COUNSEL FOR PLAINTIFF.

MR. SAVERI: GOOD AFTERNOON, YOUR HONOR.

JOSEPH SAVERI ON BEHALF OF THE PLAINTIFFS.

MR. BUTTERICK: GOOD AFTERNOON, YOUR HONOR.

MATTHEW BUTTERICK ON BEHALF OF THE PLAINTIFFS.

MR. YOUNG: GOOD AFTERNOON, YOUR HONOR.

CHRIS YOUNG ON BEHALF OF THE PLAINTIFFS.

MR. GRATZ: GOOD AFTERNOON, YOUR HONOR.

THIS IS JOE GRATZ ON BEHALF OF DEFENDANT OPENAI.

MS. HURST: GOOD AFTERNOON, YOUR HONOR.

ANNETTE HURST ON BEHALF OF DEFENDANTS GITHUB AND  
MICROSOFT.

THE COURT: I SEE AN ADDITIONAL SQUARE ON MY SCREEN  
FOR SOMEONE NAMED TRAVIS MANFREDI IF I SEE THAT CORRECTLY.

THE CLERK: YOUR HONOR, MY APOLOGIES FOR NOT  
INCLUDING THIS ON OUR APPEARANCE LIST. THAT'S THE TECH PERSON  
FOR THE PLAINTIFF.

THE COURT: VERY GOOD.

MR. SAVERI: YES, YOUR HONOR. MR. MANFREDI WILL

02:07PM 1 HELP US OUT IF WE NEED TO PUT SOMETHING ON THE SCREEN.

02:07PM 2 THE COURT: OKAY. WELL, THEN LET'S GET GOING. THIS  
02:07PM 3 IS AN INTERESTING CASE. YOU HAVE MORE PEOPLE IN THE ATTENDEES  
02:07PM 4 BOX OF THE ZOOM THAN I CUSTOMARILY SEE, SO THE CASE HAS  
02:07PM 5 ATTRACTED SOME INTEREST BEYOND THE PARTIES THEMSELVES.

02:07PM 6 IT'S ALWAYS A LITTLE HARD TO KNOW WHAT TO DO IN TERMS OF  
02:08PM 7 TIME SETTING WHEN I HAVE A SINGLE PLAINTIFF RESPONDING TO  
02:08PM 8 MULTIPLE MOTIONS. IT DOESN'T USUALLY MAKE SENSE TO JUST HEAR  
02:08PM 9 FROM ONE SIDE, YOU KNOW, ONE DEFENDANT AND HAVE THE PLAINTIFF  
02:08PM 10 RESPOND AND THEN THE OTHER DEFENDANT AND PLAINTIFF RESPOND  
02:08PM 11 BECAUSE AS IS OFTEN THE CASE AND AS THE CASE IS HERE, THERE ARE  
02:08PM 12 OVERLAPPING ARGUMENTS BEING MADE BY THE DEFENDANTS. IT WON'T  
02:08PM 13 HELP YOU TO REPEAT YOURSELVES. HONESTLY, IT PROBABLY WON'T  
02:08PM 14 HURT YOU THAT MUCH, BUT IF I'VE HEARD IT ONCE, IT'S A LITTLE  
02:08PM 15 HARDER TO PAY ATTENTION TO IT AGAIN.

02:08PM 16 SO I'M ASSUMING THERE'S GOING TO BE SOME OVERLAP.

02:08PM 17 SO FOR ALL OF THOSE REASONS, WHAT I WANT TO DO IS GIVE THE  
02:08PM 18 DEFENDANTS 34 MINUTES TO SPLIT UP, AND I WANT TO GIVE  
02:08PM 19 MR. SAVERI 26 MINUTES BECAUSE I THINK THAT'S THE WAY THAT IT  
02:08PM 20 SORT OF ACCOMMODATES ALL OF HIS PROBLEMS. THAT ADDS UP TO AN  
02:08PM 21 HOUR.

02:08PM 22 WHY DO I CHOOSE AN HOUR? BECAUSE THAT'S ABOUT AS LONG AS  
02:08PM 23 MOST HUMAN BEINGS, INCLUDING ME, CAN JUST LISTEN TO HARD STUFF  
02:08PM 24 WITHOUT INTERRUPTION.

02:08PM 25 OBVIOUSLY I COULD HAVE GIVEN YOU 20 MINUTES, WHICH IF YOU

02:08PM 1 WERE AT THE NINTH CIRCUIT IS PROBABLY THE MOST YOU COULD HAVE  
02:09PM 2 GOT. I COULD HAVE GIVEN YOU 3 HOURS, BUT I JUST PICKED AN  
02:09PM 3 HOUR. THAT'S WHAT WE'RE GOING TO DO.

02:09PM 4 I WILL NOT, UNLESS YOU TELL ME I NEED TO, DIVIDE THE TIME  
02:09PM 5 BETWEEN MS. HURST AND MR. GRATZ. I'LL LET YOU HANDLE THAT.  
02:09PM 6 SIMILARLY, THESE ARE YOUR MOTIONS. SO I THINK YOU'RE ENTITLED  
02:09PM 7 TO SAVE SOME OF YOUR TIME FOR REBUTTAL, IF THAT'S WHAT YOU  
02:09PM 8 WANT, YOU CAN SPEAK FIRST AND LAST. WE'RE NOT GOING TO DO  
02:09PM 9 THAT. WE'LL JUST MEASURE THAT 34 MINUTES. IF BOTH OF YOU ARE  
02:09PM 10 DONE TALKING AND THERE'S TIME LEFT, THEN YOU CAN USE SOME OF  
02:09PM 11 THAT FOR REBUTTAL.

02:09PM 12 DOES THAT ALL MAKE SENSE TO EVERYBODY?

02:09PM 13 MR. GRATZ: YES, YOUR HONOR.

02:09PM 14 MR. SAVERI: YOUR HONOR, JOSEPH SAVERI.

02:09PM 15 WE, ON THE PLAINTIFFS' SIDE, HAVE KIND OF ALLOCATED  
02:09PM 16 RESPONSIBILITY FOR SOME OF THE ARGUMENTS, SO WE'VE DIVIDED IT.  
02:09PM 17 SO THAT'S HOW WE WOULD BE INTERESTED IN PROCEEDING.

02:10PM 18 THE COURT: I'LL TELL YOU WHAT THEN, YOU CAN, WHEN  
02:10PM 19 IT GETS TO BE THE PLAINTIFFS' TURN, YOU CAN ADDRESS WHATEVER  
02:10PM 20 YOU WANT TO ADDRESS AND SOMEONE ELSE CAN COME ON THE SCREEN AND  
02:10PM 21 ADDRESS WHAT THEY WANT TO ADDRESS.

02:10PM 22 WHAT I DON'T WANT TO DO IS -- THERE ARE SO MANY DIFFERENT  
02:10PM 23 ISSUES ACROSS THESE MOTIONS. A, I ASSUME WE'RE NOT GOING TO  
02:10PM 24 GET TO ALL OF THEM. I WOULD HOPE WE'RE NOT GOING TO GET TO ALL  
02:10PM 25 OF THEM BECAUSE IT WOULD MEAN THAT NONE OF THEM WOULD BE

02:10PM 1 ADEQUATELY ADDRESSED. SO I DON'T REALLY WANT TO GO ISSUE BY  
02:10PM 2 ISSUE BY ISSUE. I JUST WANT TO HEAR FROM ONE SIDE KIND OF IN  
02:10PM 3 ONE FAIL SWOOP. YOU CAN PUT UP IN THE BATTER'S BOX WHOEVER YOU  
02:10PM 4 WANT AT ANY GIVEN TIME.

02:10PM 5 MR. SAVERI: THAT WORKS FOR US, YOUR HONOR. THANK  
02:10PM 6 YOU.

02:10PM 7 THE COURT: THERE WERE A COUPLE OF INSTANCES IN  
02:10PM 8 WHICH IT APPEARED TO ME THAT, FIRST OF ALL, IT APPEARED TO ME  
02:10PM 9 THAT THERE WERE A COUPLE OF INSTANCES WHERE THE PLAINTIFFS DID  
02:11PM 10 NOT RESPOND TO A PARTICULAR ARGUMENT, AND IF THERE ARE  
02:11PM 11 ARGUMENTS AS TO WHICH YOU SIMPLY WANT THE COURT TO GIVE YOU  
02:11PM 12 LEAVE TO AMEND AND YOU'RE NOT INTERESTED IN HAVING AN ARGUMENT  
02:11PM 13 TODAY, YOU CAN SAY THAT. THAT'S FINE.

02:11PM 14 I MAY HAVE QUESTIONS AS THE PARTIES GO ALONG. I DON'T  
02:11PM 15 WANT TO LARD UP THE HEARING WITH A WHOLE BUNCH OF QUESTIONS AT  
02:11PM 16 THE GET-GO. I WILL GIVE YOU A COUPLE.

02:11PM 17 SO TO THE DEFENDANTS I WOULD SAY WITH REGARD TO WHETHER  
02:11PM 18 THERE'S BEEN A SUFFICIENTLY CONCRETE PARTICULARIZED INJURY, YOU  
02:11PM 19 PROBABLY HAVE THE BETTER OF THE QUESTION OF WHETHER DAMAGES ARE  
02:11PM 20 AVAILABLE. OKAY?

02:11PM 21 TODAY AT LEAST, YOU'RE LIKELY TO WIN THAT QUESTION. BUT  
02:11PM 22 GIVEN THE ALLEGATIONS IN THE COMPLAINT THAT IT IS A  
02:11PM 23 MATHEMATICAL NEAR CERTAINTY THAT THIS PRODUCT WILL EVENTUALLY  
02:11PM 24 USE THE COPYRIGHTED MATERIAL OF CLASS MEMBERS, WHY IS THAT NOT  
02:12PM 25 ENOUGH FOR INJUNCTIVE RELIEVE? I MEAN, I KNOW YOU'RE GOING

02:12PM 1 TO -- YOU HAVE A RESPONSE TO THAT. AND PARENTHETICALLY, WHAT  
02:12PM 2 IS YOUR BEST CASE? AND DON'T SAY, YOUR HONOR, THAT'S  
02:12PM 3 INTERESTING YOU ASK ME THAT, HERE ARE SIX CASES. THE BEST CASE  
02:12PM 4 IS IN THE SINGULAR. WHAT IS THE CASE THAT WHEN I READ IT AND I  
02:12PM 5 PUT DOWN THAT CASE AND I SAY "THE DEFENDANTS WIN ON THAT  
02:12PM 6 INJUNCTIVE RELIEF POINT"?

02:12PM 7 MR. SAVERI, THE QUESTION I HAVE FOR YOU IS YOU HAVE CLAIMS  
02:12PM 8 INVOLVING THE ALLEGED MISUSE OF YOUR CLIENT'S AND PUTATIVE  
02:12PM 9 CLASS MEMBER'S PERSONAL IDENTIFYING INFORMATION. MY QUESTION  
02:12PM 10 FOR YOU IS WHAT IS IT? WHERE IS THE PII?

02:12PM 11 AS I UNDERSTAND IT, AS YOU HAVE EXPLAINED IT TO ME IN YOUR  
02:12PM 12 COMPLAINT, WHEN SOFTWARE DEVELOPERS PUT THEIR MATERIALS INTO  
02:12PM 13 GITHUB, THEY'RE SHARING THEM WITH EVERYBODY. AND I DON'T SEE  
02:13PM 14 IN THE COMPLAINT WHERE IS THE INFORMATION THAT THEY ARE KEEPING  
02:13PM 15 PERSONAL THAT GITHUB IS SOMEHOW MISUSING? SO WHEN IT GETS TO  
02:13PM 16 BE YOUR TURN, IF YOU COULD IDENTIFY THAT FOR ME, THAT WOULD BE  
02:13PM 17 HELPFUL.

02:13PM 18 MS. HURST, WOULD YOU OR MR. GRATZ LIKE TO GO FIRST?

02:13PM 19 MR. GRATZ: I WILL GO FIRST, YOUR HONOR.

02:13PM 20 THE COURT: ALL RIGHT.

02:13PM 21 MR. GRATZ: THANK YOU, YOUR HONOR.

02:13PM 22 THE COURT: YOU HAVE THE FLOOR.

02:13PM 23 MR. GRATZ: THANK YOU, YOUR HONOR.

02:13PM 24 JOE GRATZ FROM MORRISON & FORRESTER REPRESENTING OPENAI.

02:13PM 25 GENERALLY AI TECHNOLOGY IS CAPTIVATING AND EXCITING. AND

02:13PM 1 AS YOUR HONOR RECOGNIZED, THERE ARE A NUMBER OF ATTENDEES HERE  
02:13PM 2 AT THE HEARING. IT RAISES ALL MANNER OF INTERESTING QUESTIONS,  
02:13PM 3 BUT I AM HERE TO TELL YOU WHY THIS CASE AS PLEADED IN THIS  
02:13PM 4 COMPLAINT DOES NOT. AND I WANT TO START WITH THE ISSUE  
02:13PM 5 YOUR HONOR RAISED REGARDING INJURY IN FACT. AND I WANT TO  
02:13PM 6 BEGIN BY SAYING THE CHARACTERIZATION -- THE QUESTION YOUR HONOR  
02:13PM 7 ASKED WAS, WELL, LOOK, IF THE COMPLAINT PLEADS THAT IT'S A  
02:14PM 8 STATISTICAL CERTAINTY THAT THE PLAINTIFFS' CODE WILL EVENTUALLY  
02:14PM 9 COME OUT OF COPILOT, WHY ISN'T THAT SUFFICIENT INJURY FOR  
02:14PM 10 INJUNCTIVE RELIEVE?

02:14PM 11 AND I THINK MY FIRST ANSWER TO THAT, YOUR HONOR, IS THAT'S  
02:14PM 12 NOT WHAT THE COMPLAINT SAYS. IN FACT, THE COMPLAINT SAYS  
02:14PM 13 SOMETHING TOTALLY INCONSISTENT WITH THAT AND IMPORTANTLY  
02:14PM 14 CONSISTENT WITH THAT.

02:14PM 15 IN PARAGRAPH 79 OF THE COMPLAINT, AND WE CITE THIS IN OUR  
02:14PM 16 PAPERS, IT SAYS ESSENTIALLY COPILOT RETURNS THE SOLUTION THAT  
02:14PM 17 IT HAS FOUND IN THE MOST PROJECTS WHEN THOSE PROJECTS ARE  
02:14PM 18 WEIGHTED AND SO ON.

02:14PM 19 ELSEWHERE THEY SAY THAT IT RETURNS SORT OF THE MOST COMMON  
02:14PM 20 SOLUTION TO A PARTICULAR ISSUE. THAT'S WHAT THEY PLEAD IN THE  
02:14PM 21 COMPLAINT.

02:14PM 22 AND THE PROBLEM FOR THEM IS THEY HAVE NOT IDENTIFIED ANY  
02:14PM 23 CIRCUMSTANCE IN WHICH THERE'S ANY REASON TO THINK THAT ANYTHING  
02:14PM 24 THAT THEY EVER WROTE IN WHICH THEY OWN A COPYRIGHT IS THAT SORT  
02:14PM 25 OF SOLUTION, IS THAT SORT OF CODE THAT WOULD EVER BE LIKELY TO



02:15PM 1 BE OUTPUTTED BY COPILOT.

02:15PM 2 THAT IS THE DIFFERENCE BETWEEN THE I THINK HARD QUESTION  
02:15PM 3 YOUR HONOR ASKED AND WHAT WE SEE AS THE EASIER QUESTION THAT IS  
02:15PM 4 PRESENTED BY THIS COMPLAINT AND THAT APPEARS IN THIS MOTION.

02:15PM 5 AND THE BEST CASE, YOUR HONOR, ON THIS I THINK AS WE CITED  
02:15PM 6 IN OUR PAPERS IS THE BIRDSONG AGAINST APPLE CASE IN THE  
02:15PM 7 NINTH CIRCUIT. AND THAT'S A CASE WHERE SOME PLAINTIFFS, NAMED  
02:15PM 8 PLAINTIFFS FILED A LAWSUIT AND THEY SAID THERE'S A PROBLEM WITH  
02:15PM 9 THE IPOD, AND IT PLAYS TOO LOUD. IT CAUSES HEARING LOSS.

02:15PM 10 BUT THOSE NAMED PLAINTIFFS HAD NOT PLAYED THEIR IPODS TOO  
02:15PM 11 LOUD AND EXPERIENCED HEARING LOSS. THEY WERE NOT AMONG THE  
02:15PM 12 PEOPLE WITHIN THE IDENTIFIED CLASS WHO HAD EXPERIENCED THAT  
02:15PM 13 INJURY IN FACT AND WHO HAD BEEN AFFECTED BY THAT ALLEGED  
02:16PM 14 PROBLEM, AND SO THEY DIDN'T HAVE STANDING EVEN IF SOMEONE ELSE  
02:16PM 15 IN THE PUTATIVE CLASS MIGHT HAVE.

02:16PM 16 SO THAT, YOUR HONOR, IS WHY WE THINK THESE PLAINTIFFS  
02:16PM 17 HAVEN'T IDENTIFIED AN INJURY IN FACT THAT THEY HAVE SUFFERED.

02:16PM 18 THE COURT: CAN I ASK YOU -- CAN I REFRAME THAT A  
02:16PM 19 LITTLE BIT --

02:16PM 20 MR. GRATZ: PLEASE.

02:16PM 21 THE COURT: -- AND ASK YOU IF WHAT YOU'RE SAYING TO  
02:16PM 22 ME -- BECAUSE I UNDERSTAND WHY BIRDSONG IS A GOOD CASE, WHY YOU  
02:16PM 23 THINK IT'S A GOOD CASE FOR YOU, BUT BIRDSONG IS NOT A CASE  
02:16PM 24 ABOUT PROBABILITIES BECAUSE IN ORDER TO MAKE BIRDSONG TRACK THE  
02:16PM 25 FACTS OF OUR CASE, I THINK IT WOULD HAVE HAD TO HAVE BEEN THE

02:16PM 1 CASE THAT THE IPOD, WHETHER OR NOT YOU RAISE THE VOLUME, AT  
02:16PM 2 SOME POINT WOULD PLAY TOO LOUD, BUT IT JUST DIDN'T HAPPEN TO  
02:16PM 3 THESE TWO PEOPLE YET, THEN IT WOULD BE CLOSER TO BEING ON ALL  
02:16PM 4 FOUR'S.

02:16PM 5 SO WHAT I HEAR YOU SAYING IS THAT AN IMPORTANT DISTINCTION  
02:17PM 6 IS THAT IT'S NOT RANDOM. SO COPILOT IS NOT RANDOMLY SELECTING  
02:17PM 7 FROM EVERYBODY'S CODE, IT'S NOT LIKE THOSE OLD CD, YOU KNOW,  
02:17PM 8 MULTIPLE CD PLAYERS THAT WOULD PICK ONE TRACK FROM CD2 AND ONE  
02:17PM 9 FROM CD3. THE CODE HAS TO HAVE CERTAIN CHARACTERISTICS --  
02:17PM 10 PREVALENCE IS NOT THE RIGHT WORD, BUT YOU KNOW WHAT I MEAN --  
02:17PM 11 AND IF IT DOESN'T HAVE THOSE, COPILOT IS JUST NOT GOING TO PICK  
02:17PM 12 IT.

02:17PM 13 MR. GRATZ: THAT'S RIGHT, YOUR HONOR. AND I GUESS  
02:17PM 14 TO STATE IT SLIGHTLY DIFFERENTLY, IF THERE WAS AN ALLEGATION  
02:17PM 15 THAT ALL CODE IS EQUALLY LIKELY TO BE REPRODUCED IN THAT WAY,  
02:17PM 16 RIGHT, THAT WOULD BE DIFFERENT. BUT THEY HAVEN'T ALLEGED THAT  
02:17PM 17 AND THEY CAN'T ALLEGE THAT BECAUSE THEY HAVE ALLEGED SOMETHING  
02:17PM 18 THAT IS VERY DIFFERENT FROM THAT, THAT IS, THAT THE CODE THAT  
02:17PM 19 IS SUGGESTED IS CODE THAT IS A SOLUTION THAT IS COMMON TO A  
02:18PM 20 PARTICULAR ISSUE, THAT THE MODEL IN TRAINING HAS SEEN MANY  
02:18PM 21 TIMES WHEN THE THING THAT IT RETURNS OR PROVIDES IS SIMILAR TO  
02:18PM 22 ANYTHING THAT IT HAS EVER SEEN BEFORE. IT HAS SEEN THAT THING  
02:18PM 23 MANY TIMES.

02:18PM 24 THE COURT: OKAY. I DON'T WANT YOU TO USE TOO MUCH  
02:18PM 25 OF YOUR TIME. I THINK -- BUT YOU'VE MADE A GOOD POINT AND I

02:18PM 1 THINK I HAVE THE POINT.

02:18PM 2 MR. GRATZ: SO THAT IS THE POINT WITH RESPECT,  
02:18PM 3 YOUR HONOR, TO THE INJURY IN FACT POINT. WE THINK THERE'S A  
02:18PM 4 ANONYMOUS PLEADING ISSUE, BUT I THINK WE WILL ALL ADDRESS THAT  
02:18PM 5 WHEN WE TALK ABOUT CONFIDENTIALITY AND THE NAMES OF THE  
02:18PM 6 PLAINTIFFS.

02:18PM 7 THE COURT: I'VE GOT TO TELL YOU, I DON'T THINK  
02:18PM 8 ANONYMOUS PLEADING IS A WINNER FOR YOU. SO IF IT'S IMPORTANT  
02:18PM 9 TO YOU, YOU KNOW, MAKE THE ARGUMENT. BUT IN TERMS OF A  
02:18PM 10 TENTATIVE RULING, I THINK THE PLAINTIFFS ARE GOING TO WIN THAT  
02:18PM 11 ONE.

02:18PM 12 MR. GRATZ: FOR MY PURPOSES AT LEAST, YOUR HONOR, I  
02:18PM 13 WILL MOVE ON, AND WE CAN ADDRESS THAT IN THE CONTEXT OF A  
02:19PM 14 PROTECTIVE ORDER ISSUE.

02:19PM 15 THE COURT: AND JUST FOR THE SAKE OF ANYONE WHO IS  
02:19PM 16 WATCHING THE HEARING, I THINK IT'S IMPORTANT TO JUST NOTE THAT  
02:19PM 17 THE DEFENDANTS IN THIS CASE HAVE THE IDENTITIES OF THE  
02:19PM 18 INDIVIDUAL PLAINTIFFS. SO IT'S NOT A QUESTION OF A DEFENDANT  
02:19PM 19 DUE PROCESS ISSUE. THERE ARE OTHER ISSUES IMPLICATED FOR THIS  
02:19PM 20 PLAINTIFF ANONYMITY. ANYWAY, GO AHEAD.

02:19PM 21 MR. GRATZ: I WANT TO MOVE YOUR HONOR TO THE 1202(B)  
02:19PM 22 CLAIM. THERE'S A 1202(A) CLAIM WHICH WAS ABANDONED FOR FALSE  
02:19PM 23 COPYRIGHT MANAGEMENT INFORMATION. THERE'S A 1202(B) CLAIM FOR  
02:19PM 24 REMOVAL OF COPYRIGHT MANAGEMENT INFORMATION.

02:19PM 25 THIS IS, OF COURSE, A CURIOUS CASE IN THAT IT SEEMS TO

02:19PM 1 SOUND IN COPYRIGHT, BUT THERE'S NO COPYRIGHT INFRINGEMENT  
02:19PM 2 CLAIM. IT'S ONLY BECAUSE THE PLAINTIFFS DON'T HOLD ANY  
02:19PM 3 COPYRIGHT REGISTRATIONS.

02:19PM 4 THEY BROUGHT THIS 1202(B) CLAIM. THERE'S A NUMBER OF  
02:19PM 5 PROBLEMS, AND LET ME START, YOUR HONOR, WITH THE ONE I THINK  
02:19PM 6 THEY CAN'T FIX.

02:19PM 7 COURTS IN THE NINTH CIRCUIT REQUIRE THAT INFORMATION BE  
02:19PM 8 REMOVED IN ORDER TO SUPPORT A 1202(B) CLAIM NOT JUST FROM  
02:20PM 9 SOMETHING THAT CONTAINED SOME OF THE PLAINTIFFS' WORK OR IT  
02:20PM 10 LOOKS KIND OF LIKE THE PLAINTIFFS' WORK BUT FROM SOMETHING THAT  
02:20PM 11 IS THE PLAINTIFFS' WORK, THAT THE WORDS THAT COURT USE IS  
02:20PM 12 IDENTICAL TO THE PLAINTIFFS' WORK.

02:20PM 13 AND IN THE FROST-TSUJI CASE FROM THE DISTRICT OF HAWAII IS  
02:20PM 14 OUR BEST CASE ON THIS, IT WAS AFFIRMED, AS WELL AS THE  
02:20PM 15 KIRK KARA CASE FROM THE CENTRAL DISTRICT OF CALIFORNIA. THEY  
02:20PM 16 HOLD THAT WHERE IT IS JUST SIMILAR BUT NOT THE WORK THAT IS  
02:20PM 17 FAILING TO ALSO COPY THE INFORMATION DOESN'T VIOLATE THE  
02:20PM 18 STATUTE.

02:20PM 19 AND ANYTHING ELSE WOULD TAKE THE CONCEPT OF REMOVAL TOO  
02:20PM 20 FAR. IF I LOOK AT A PHOTO IN A MAGAZINE AND MAKE A PAINTING  
02:20PM 21 THAT IS SUBSTANTIALLY SIMILAR TO AND INFRINGES THE PHOTO, AND  
02:20PM 22 THE PHOTO HAPPENED TO HAVE A CREDIT LINE UNDER IT, I'M NOT  
02:20PM 23 REMOVING THAT CREDIT LINE IF I DON'T PAINT IT IN MY PAINTING.  
02:20PM 24 I MIGHT BE INFRINGING THE COPYRIGHT, BUT I'M NOT REMOVING THE  
02:20PM 25 CREDIT LINE IN ANY SENSE. IT'S MY PAINTING, NOT JUST A DIRECT

02:21PM 1 IDENTICAL COPY OF THE WHOLE PHOTO.

02:21PM 2 AND THAT'S A PROBLEM FOR THEM BECAUSE THEY AFFIRMATIVELY  
02:21PM 3 PLEAD THAT IT IS NOT IDENTICAL. NOT JUST THAT IT'S NOT  
02:21PM 4 IDENTICAL TO THE ENTIRETY, WHICH IS WHAT THEY WOULD NEED TO  
02:21PM 5 PLEAD, BUT THAT EVEN THE PORTIONS THAT APPEAR IN THE OUTPUT ARE  
02:21PM 6 NOT IDENTICAL. THEY SAY THEY'RE NEAR IDENTICAL OR ALMOST  
02:21PM 7 VERBATIM OR NEARLY A VERBATIM COPY. THOSE ARE PARAGRAPHS 46  
02:21PM 8 AND 60 AND 74 IN THE COMPLAINT.

02:21PM 9 AND THAT'S THE FIRST PROBLEM ON 1202. IT'S ONE THAT WE  
02:21PM 10 THINK THEY CAN'T FIX. AND WE THINK IT IS ONE THAT IS SORT OF  
02:21PM 11 FATAL TO THEIR CLAIM BECAUSE THEY HAVE SORT OF PLEADED THE  
02:21PM 12 OPPOSITE OF WHAT THEY WOULD NEED TO PLEAD.

02:21PM 13 WE THINK THERE ARE A NUMBER OF OTHER PROBLEMS WITH THE  
02:21PM 14 1202(B) CLAIM. THEY DON'T IDENTIFY WHAT IT WAS REMOVED FROM,  
02:21PM 15 THEY DON'T IDENTIFY WHAT WAS REMOVED, AND THEY DON'T SAY WHY IT  
02:22PM 16 WAS CMI IN THAT HOW IT WOULD SORT OF AFFECT ANYTHING.

02:22PM 17 BUT THE THRESHOLD PROBLEM IS THAT IT WASN'T REMOVED FROM  
02:22PM 18 AN IDENTICAL COPY AS THE FROST-TSUGI CASE REQUIRES.

02:22PM 19 WE ALSO THINK THAT THEY HAVEN'T PLEADED WHAT THEY NEED TO  
02:22PM 20 PLEAD WITH RESPECT TO THE MENTAL STATE ELEMENT, AND WE  
02:22PM 21 RECOGNIZE THAT AT THE PLEADING STAGE MENTAL STATE IS IN  
02:22PM 22 SOMETHING OF A CATEGORY OF ITS OWN.

02:22PM 23 BUT HERE THE MENTAL STATE THAT THEY NEED TO MAKE PLAUSIBLE  
02:22PM 24 IS THAT THERE WAS REASON TO KNOW THAT REMOVING CERTAIN  
02:22PM 25 INFORMATION WOULD INDUCE, ENABLE, FACILITATE OR CONCEAL

02:22PM 1 COPYRIGHT INFRINGEMENT, ACTUAL COPYRIGHT INFRINGEMENT, NOT FAIR  
02:22PM 2 USE, NOT SOMETHING THAT IS FALSELY KNOWN AS AN ACCEPTABLE  
02:22PM 3 LIMITATION COPYRIGHT INFRINGEMENT. AND IN ORDER TO MAKE THAT  
02:22PM 4 PLAUSIBLE, THEY NEED TO GIVE US SOME FACTS THAT WOULD ENABLE --  
02:22PM 5 THAT WOULD SHOW THAT THERE WERE -- YOU KNOW, WE HAD THOSE  
02:23PM 6 GROUNDS TO KNOW THAT. WHAT WERE THOSE GROUNDS, THAT IF THEY  
02:23PM 7 WERE ALL TRUE, WOULD PLAUSIBLY ADD UP TO US HAVING REASON TO  
02:23PM 8 KNOW, REASONABLE GROUNDS TO KNOW THAT IT WOULD INDUCE, ENABLE,  
02:23PM 9 FACILITATE OR CONCEAL COPYRIGHT INFRINGEMENT AS OPPOSED TO FAIR  
02:23PM 10 USE.

02:23PM 11 WE THINK IT IS IMPORTANT, YOUR HONOR, THAT A BELIEF THAT  
02:23PM 12 SOMETHING IS FAIR USE IS THE OPPOSITE OF REASONABLE GROUNDS TO  
02:23PM 13 KNOW THAT IT IS COPYRIGHT INFRINGEMENT, AND THAT'S A PLACE  
02:23PM 14 WHERE THE PARTIES ARE AT ODDS ON A LEGAL ISSUE AND THAT LEGAL  
02:23PM 15 ISSUE IS NOT ONE THAT THE COURT NEEDS TO REACH.

02:23PM 16 THE COURT: WELL, LET ME ASK YOU, THOUGH. LET'S SAY  
02:23PM 17 I WERE TO ACCEPT THAT ARGUMENT AS YOU HAVE, AND I DON'T KNOW TO  
02:23PM 18 WHAT EXTENT IT EXACTLY TRACKS WHAT IS IN THE BRIEF, BUT LET'S  
02:23PM 19 SAY I ACCEPT THE ARGUMENT THAT YOU MADE AT THE HEARING EXACTLY  
02:23PM 20 AS YOU'VE SAID IT, WOULDN'T EVERY DEFENDANT JUST SAY, WELL, I  
02:23PM 21 THOUGHT IT WAS FAIR USE?

02:23PM 22 MR. GRATZ: EVERY DEFENDANT MIGHT WELL SAY THEY  
02:23PM 23 THOUGHT IT WAS FAIR USE, AND THE QUESTION WOULD BE WHETHER THEY  
02:24PM 24 HAD REASONABLE GROUNDS TO KNOW IT WASN'T.

02:24PM 25 THERE ARE MANY CASES IN WHICH THAT IS NOT A -- THAT

02:24PM 1 DOESN'T REQUIRE ANYTHING OR ALMOST ANYTHING TO PLEAD IT, RIGHT?  
02:24PM 2 BUT THIS IS A CASE INVOLVING PARTIAL COPYING OF FUNCTIONAL  
02:24PM 3 COMPUTER CODE --

02:24PM 4 THE COURT: RIGHT.

02:24PM 5 MR. GRATZ: -- EVEN IN THE SORT OF -- EVEN IF ALL OF  
02:24PM 6 THE FACTUAL ALLEGATIONS ARE TRUE, AND IN ORDER TO GET THERE,  
02:24PM 7 THERE WE NEED MORE THAN, YOU KNOW, SOMEWHAT -- SOME AMOUNT OF  
02:24PM 8 SOMEWHAT SIMILAR CODE CAME OVER, AND THAT'S PARTICULARLY TRUE  
02:24PM 9 IN LIGHT I THINK OF WHAT THE SUPREME COURT SAID ABOUT WHAT WE  
02:24PM 10 THINK IS A SIMILAR SITUATION IN ORACLE/GOOGLE ABOUT HOW FAIR  
02:24PM 11 USE WORKS IN THIS SITUATION WHERE THE PURPOSE FOR WHICH THE  
02:24PM 12 COPYING IS OCCURRING IS FOR THE CREATION OF A NEW WORK BY OTHER  
02:24PM 13 PROGRAMMERS THAT BUILDS ON TOP OF WHAT ALREADY EXISTS.

02:24PM 14 SO WE THINK THEY'VE GOT TO GO BEYOND SAYING, WELL, LOOK,  
02:25PM 15 THIS WAS OVER THERE, THEREFORE, THEY HAD REASONABLE GROUNDS TO  
02:25PM 16 KNOW THAT THEY WERE INDUCING, ENABLING, FACILITATING OR  
02:25PM 17 CONCEALING INFRINGEMENT BUT TO SAY WHY THAT COULD BE IN THESE  
02:25PM 18 CIRCUMSTANCES.

02:25PM 19 AND SO I WANT TO MOVE ON FROM THE 1202 CLAIM TO VERY  
02:25PM 20 QUICKLY TOUCH ON A FEW OTHER ISSUES IN OUR REMAINING TIME. I  
02:25PM 21 WILL GO IN ORDER THAT THE COMPLAINT GOES ON A BIT OF A  
02:25PM 22 ROLLICKING MOVE THROUGH ALL OF THE CLAIMS.

02:25PM 23 THERE'S A BREACH OF CONTRACT CLAIM THAT INCLUDES OPENAI AS  
02:25PM 24 COUNT TWO. THEY DON'T SAY WHAT CONTRACT, THEY DON'T SAY WHAT  
02:25PM 25 PROVISION WE'VE BREACHED, THEY DON'T SAY WHAT WE DID TO BREACH

IT. THIS IS THE MCAFEE CASE ON PAGE 10 OF OUR REPLY BRIEF.  
THEY NEED TO SAY WHAT THE TERMS OF THE CONTRACT ARE AND SOME  
SPECIFICITY ABOUT WHAT WE DID TO BREACH IT.

THEY'VE ABANDONED COUNT THREE, TORTUOUS INTERFERENCE;  
THEY'VE ABANDONED COUNT FOUR, FRAUD; THEY'VE ABANDONED  
COUNT FIVE, FALSE DESIGNATION OF ORIGIN.

AS TO UNJUST ENRICHMENT, COUNT SIX, THIS IS A CLAIM THAT  
DOESN'T, FOR MOST PURPOSES IN MOST OF ITS FORMS, EXIST AS A  
SEPARATE CLAIM. IT COULD EXIST AS A QUASI CONTRACT CLAIM FOR  
RESTITUTION, BUT THEY DON'T SAY FOR WHAT A RESTITUTION CLAIM  
THEY GAVE US THAT WE COULD GIVE THEM BACK OR WHAT THE BENEFIT  
THEY -- THAT WAS CONFERRED TO BE OTHER THAN SOMETHING THAT  
WOULD WALK THEM DIRECTLY INTO PREEMPTION.

AS TO COUNT SEVEN, UNFAIR COMPETITION LAW, LARGELY THE  
SAME IS TRUE. IT'S HARD TO FIND ANYTHING UNDERLYING THAT  
WOULDN'T WALK DIRECTLY INTO A PREEMPTION ARGUMENT. THERE IS AN  
INDEPENDENT PROBLEM THAT THEY ONLY GET THIS IF THERE'S ANY  
ADEQUATE REMEDY AT LAW, AND THEY DON'T SAY WHAT THAT MIGHT BE,  
AND THAT'S THE SILVERCREST CASE ON PAGE 12 OF OUR BRIEF.

COUNT EIGHT IS JUST AGAINST GITHUB, SO I WON'T ADDRESS IT.

COUNT NINE WAS ABANDONED, THE CCPA.

COUNT TEN IS A NEGLIGENCE CLAIM. I WANT TO ADDRESS THAT  
BRIEFLY. THEY SAY THERE'S A DUTY OF CARE THAT WAS BREACHED.  
AND THE PROBLEM IS THAT THERE IS NO DUTY OF CARE IN THE  
HANDLING OF PUBLIC INFORMATION AS YOUR HONOR'S QUESTION TO THE



02:27PM 1 PLAINTIFFS THAT I'M VERY INTERESTED IN THEIR ANSWER TO ADDRESS.  
02:27PM 2 THE INFORMATION HERE THEY AFFIRMATIVELY PLEAD THAT THIS IS  
02:27PM 3 INFORMATION THAT WAS PUBLICALLY POSTED BY THE PLAINTIFFS ON  
02:27PM 4 GITHUB AND SO -- AND THAT'S AT PARAGRAPH 82 OF THE COMPLAINT.

02:27PM 5 AND SO THEIR BIGGEST PROBLEM, THE PROBLEM THAT WE THINK  
02:27PM 6 THEY CAN'T FIX IS THAT THERE'S NO PRIVACY RELATED HARM BECAUSE  
02:27PM 7 THE MATERIAL HAD BEEN POSTED BY THEM PUBLICALLY AND THAT THERE  
02:27PM 8 ISN'T ANY SORT OF NON-PRIVACY RELATED HARM, SOME SORT OF  
02:27PM 9 COPYING RELATED HARM BECAUSE THAT WOULD LEAVE THE CLAIM TO BE  
02:27PM 10 PREEMPTED BECAUSE THERE WOULDN'T BE EX REL. AND THAT THERE'S  
02:28PM 11 NOTHING HERE THAT CREATES A SPECIAL RELATIONSHIP. THERE'S NO  
02:28PM 12 SPECIAL RELATIONSHIP BETWEEN SOMEONE WHO USES PUBLICALLY POSTED  
02:28PM 13 INFORMATION ON THE INTERNET AND THE PERSON WHO POSTED IT.

02:28PM 14 THE LAST TWO CLAIMS ARE CIVIL CONSPIRACY, WHICH IS NOT AN  
02:28PM 15 INDEPENDENT CAUSE OF ACTION OR AT LEAST THEY HAVEN'T ALLEGED  
02:28PM 16 ANY SPECIFIC --

02:28PM 17 THE COURT: YOU'RE GOING TO WIN THAT ONE.

02:28PM 18 MR. GRATZ: GREAT. AND THEY'VE ABANDONED COUNT  
02:28PM 19 TWELVE, DEC RELIEVE.

02:28PM 20 SO UNLESS THE COURT HAS FURTHER QUESTIONS, I WILL PAUSE  
02:28PM 21 THERE.

02:28PM 22 THE COURT: VERY GOOD.

02:28PM 23 MR. GRATZ, YOU USED ABOUT 14 MINUTES.

02:28PM 24 MS. HURST.

02:28PM 25 MS. HURST: THANK YOU, YOUR HONOR.

02:28PM 1 THE DEFENDANTS AGREED TO SPLIT THE TIME, SO I WILL NOT  
02:28PM 2 TAKE MORE THAN 17 MINUTES. BUT I DO INTEND TO SAVE SOME TIME  
02:28PM 3 FOR REBUTTAL.

02:28PM 4 THE COURT: ALL RIGHT.

02:28PM 5 MS. HURST: YOUR HONOR, GITHUB WAS FOUNDED WITH THE  
02:28PM 6 GOAL TO SUPPORT THE DEVELOPMENT COMMUNITY AND TO MAKE LIFE  
02:28PM 7 BETTER FOR SOFTWARE DEVELOPERS. ITS MOST RECENT INITIATIVE TO  
02:28PM 8 DO THAT IS THE COPILOT TOOL. TAKING THE ACCUMULATED KNOWLEDGE  
02:29PM 9 ABOUT CODING, STUDYING THAT KNOWLEDGE AND PROVIDING IT TO THE  
02:29PM 10 DEVELOPER COMMUNITY AT THE PRICE OF \$100 A YEAR, GITHUB IS  
02:29PM 11 MAKING LIFE BETTER FOR SOFTWARE DEVELOPERS.

02:29PM 12 PLAINTIFFS HAVE MADE WHAT THEY CALL A \$9 BILLION BRAVE NEW  
02:29PM 13 WORLD OF SOFTWARE PIRACY CASE, BUT THEY'VE DONE THAT,  
02:29PM 14 YOUR HONOR, WITHOUT A COPYRIGHT INFRINGEMENT CLAIM. AND THE  
02:29PM 15 SIGNIFICANCE OF THAT OMISSION IS GREAT. IT EXPLAINS THE  
02:29PM 16 DEFECTS IN SUBSTANTIAL PORTIONS OF THE COMPLAINT.

02:29PM 17 YOUR HONOR, WITH RESPECT TO THE 1202(B) CLAIM, AND I WILL  
02:29PM 18 DO MY BEST NOT TO BE DUPLICATIVE OF MR. GRATZ HERE, I JUST WANT  
02:29PM 19 TO FOCUS ON STEVENS VERSUS CORELOGIC AND THE CONCEPT OF DUAL  
02:29PM 20 USE TECHNOLOGIES. YOUR HONOR, IT'S CLEAR THAT A MACHINE  
02:30PM 21 LEARNING MODEL OF THE TYPE HERE HAS A GREAT NUMBER OF  
02:30PM 22 NON-INFRINGEMENTS.

02:30PM 23 ACCORDING TO THE PLAINTIFFS' COMPLAINT, IT MAY IN VERY  
02:30PM 24 LIMITED INSTANCES OUTPUT MATCHING CODE, BUT THEY'VE GIVEN NO  
02:30PM 25 FACTS TO SUGGEST THAT THAT EVEN WOULD BE AN INFRINGEMENT.

02:30PM 1 BUT EVEN ASSUMING THAT THERE WERE SOME INFRINGING USES,  
02:30PM 2 YOUR HONOR, COPYRIGHT LAW HAS LONG HAD A RULE EVER SINCE SONY  
02:30PM 3 VERSUS BETAMAX THAT WHEN YOU HAVE TECHNOLOGY THAT ADVANCES THE  
02:30PM 4 WORLD THE WAY THIS TECHNOLOGY DOES, THAT IS CAPABLE OF SO MANY  
02:30PM 5 NON-INFRINGING USES, ONE CANNOT JUST ASSUME THAT IT IS PUT OUT  
02:30PM 6 INTO THE WORLD WITH THE OBJECTIVE OF INFRINGEMENT.

02:30PM 7 YOUR HONOR ASKED FOR OUR BEST CASES, AND I BET THE COURT  
02:30PM 8 HEARS ABOUT TWOMBLY AND RULE 8 CONTEXTS ALL OF THE TIME. BUT  
02:31PM 9 TWOMBLY ON THE FACTS IS ACTUALLY QUITE APPPOSITE HERE BECAUSE IN  
02:31PM 10 THAT CASE YOU HAD CONDUCT, PARALLEL CONDUCT THAT WAS ALLEGED IN  
02:31PM 11 A CONCLUSORY FASHION TO BE THE ULTIMATE OBJECT OF THE STATUTE,  
02:31PM 12 AN AGREEMENT TO RESTRAIN TRADE.

02:31PM 13 BUT THE COURT SAID WE HAVE TO -- WE HAVE CONDUCT HERE THAT  
02:31PM 14 IS EQUALLY CONSISTENT WITH LAWFUL AND UNLAWFUL BEHAVIOR.

02:31PM 15 AND SO WHAT WE NEED ARE SOME FACTS TO TIP IT OVER INTO  
02:31PM 16 PLAUSIBILITY THAT THE UNLAWFUL OBJECTIVE IS THE ONE THAT IS  
02:31PM 17 INTENDED.

02:31PM 18 YOUR HONOR, THAT RATIONALE APPLIES EQUALLY HERE, AND YOU  
02:31PM 19 CAN SEE THAT THAT ANIMATES THIS IDEA OF SUBSTANTIAL  
02:31PM 20 NON-INFRINGING USES, ANIMATES THE DISCUSSION IN STEVENS VERSUS  
02:31PM 21 CORELOGIC WHERE THE COURT HELD THAT THE CONCEPT OF RESULTING  
02:31PM 22 LIKELY INFRINGEMENT IS A CRITICAL CONCEPT IN FINDING THAT THE  
02:31PM 23 STATUTE CAN BE VIOLATED.

02:31PM 24 YOUR HONOR, I WOULD ALSO REFER THE COURT TO THE HARRISON  
02:32PM 25 VERSUS PINTEREST CASE WHICH APPLIED STEVENS IN THE 12 (B) (6)

02:32PM 1 CONTEXT. THE COURT SAID PINTEREST WITH THE PHOTO BOARDS IS A  
02:32PM 2 TECHNOLOGY THAT CAN BE USED FOR BOTH INFRINGING AND  
02:32PM 3 NON-INFRINGING PURPOSES.

02:32PM 4 AND AT THE PLEADING STAGE THE COURT SAID THERE WERE  
02:32PM 5 INSUFFICIENT FACTS ALLEGED TO DRAW A REASONABLE INFERENCE THAT  
02:32PM 6 THE INTENDED OUTCOME WAS THE INFRINGING ONE, AND THAT IS  
02:32PM 7 CERTAINLY THE CASE HERE, YOUR HONOR.

02:32PM 8 ONE OF THE ARGUMENTS THAT PLAINTIFF HAS MADE IS THAT UNDER  
02:32PM 9 THE DMCA, INFRINGEMENT IS NOT REQUIRED. YOUR HONOR, PLAINTIFFS  
02:32PM 10 HAVE CONFLATED SECTION 1201 AND SECTION 1202 IN MAKING THAT  
02:32PM 11 ARGUMENT.

02:32PM 12 SECTION 1201 AND 1202 ARE VERY DIFFERENT. 1201 IS THE  
02:32PM 13 ANTI-CIRCUMVENTION PROVISION. IT CONCERNS ITSELF WITH ACCESS  
02:32PM 14 AND COPY CONTROLS, AND IT'S TRUE, THAT STATUTE HAS NO REFERENCE  
02:32PM 15 TO THE CONCEPT OF INFRINGEMENT.

02:33PM 16 1202, HOWEVER, DOES. IT INCORPORATES INFRINGEMENT BY  
02:33PM 17 REFERENCE AND STEVENS SAYS THERE HAVE TO BE THESE OBJECTIVE  
02:33PM 18 MANIFESTATIONS OF LIKELY RESULTING INFRINGEMENT FROM THE  
02:33PM 19 ALLEGED REMOVAL OF CMI.

02:33PM 20 AND, YOUR HONOR, THAT'S WHERE THE CONCEPT OF FAIR USE ALSO  
02:33PM 21 BECOMES VERY IMPORTANT BECAUSE THE STRUCTURE OF THE COPYRIGHT  
02:33PM 22 ACT IS SUCH THAT IF WE LOOK AT SECTION 107 AND 106, WHAT THEY  
02:33PM 23 SAY IS THAT IF IT'S A FAIR USE, IT'S NOT AN INFRINGEMENT. IT  
02:33PM 24 BECOMES NOT AN INFRINGEMENT IF IT'S A FAIR USE.

02:33PM 25 AND SO THE PLAINTIFFS' PLEADING HAS TO TAKE THAT

02:33PM 1 POSSIBILITY INTO ACCOUNT IN ORDER TO MEET THE REQUIREMENT OF  
02:33PM 2 PLEADING THE REMOVAL OF CMI IS INTENDED TO RESULT IN  
02:33PM 3 INFRINGEMENT. AND, YOUR HONOR, THOSE FACTS ARE SIMPLY NOT  
02:33PM 4 PRESENT IN THE PLEADING.

02:33PM 5 YOUR HONOR, IN LARGE PART THEY'RE NOT PRESENT BECAUSE  
02:34PM 6 PLAINTIFFS HAVE NOT PLED THAT THEIR CODE WILL BE OUTPUT. AND  
02:34PM 7 TO GIVE EXAMPLES OF THE KIND OF FACTS THAT THEY COULD PLEAD,  
02:34PM 8 THEY COULD PLEAD, FOR EXAMPLE, THAT THEIR PUBLIC REPOSITORIES  
02:34PM 9 OF CODE WERE EXTREMELY POPULAR, THAT THEY HAD BEEN FORKED MANY  
02:34PM 10 TIMES, THAT THEIR CODE PERFORMS FUNCTIONS THAT ARE WIDELY  
02:34PM 11 NEEDED OR THAT THEY PROVIDE UNIQUE SOLUTIONS THAT MANY OTHERS  
02:34PM 12 HAVEN'T LOOKED TO.

02:34PM 13 THERE ARE MANY FACTS THAT ARE EXCLUSIVELY WITHIN THEIR  
02:34PM 14 CONTROL ABOUT THE VIRTUES OF THEIR OWN CODE THAT ARE FACTS THAT  
02:34PM 15 COULD HAVE BEEN SUPPLIED IN THE COMPLAINT TO GIVE RISE TO SOME  
02:34PM 16 INFERENCE THAT THEIR CODE WAS EVER LIKELY TO BE OUTPUT, BUT NO  
02:34PM 17 SUCH FACTS ARE PRESENT, YOUR HONOR, SHOWING NOT ONLY THAT THEY  
02:34PM 18 LACK THE KIND OF INJURY THAT IS REQUIRED FOR ARTICLE III  
02:34PM 19 PURPOSES BUT ALSO THAT THEY SIMPLY HAVEN'T PLED A 1202(B)  
02:34PM 20 CLAIM.

02:35PM 21 YOUR HONOR, I'D ALSO LIKE TO POINT OUT THAT THE LACK --  
02:35PM 22 THE OMITTED COPYRIGHT INFRINGEMENT CLAIM EXPLAINS DEFECTS IN A  
02:35PM 23 NUMBER OF THE STATE LAW TORT CLAIMS. NOW, THEY'VE ABANDONED  
02:35PM 24 QUITE A FEW OF THESE CLAIMS, AND I WON'T ADDRESS THEM. BUT  
02:35PM 25 THEY APPEAR TO CONTINUE TO PRESS THE UNJUST ENRICHMENT AND

02:35PM 1 UNFAIR COMPETITION CLAIM.

02:35PM 2 WELL, YOUR HONOR, THOSE ARE JUST IMPROPER SUBSTITUTES FOR  
02:35PM 3 A COPYRIGHT INFRINGEMENT CLAIM BECAUSE THE ACT THAT THEY ALLEGE  
02:35PM 4 THAT HARMS THEM IN THOSE CLAIMS IS EITHER THE CREATION OF A  
02:35PM 5 DERIVATIVE WORK OR THE REPRODUCTION OF THEIR ALLEGED  
02:35PM 6 COPYRIGHTED MATERIALS.

02:35PM 7 THOSE ARE BOTH CLEAR INVASIONS OF THE SECTION 106 RIGHT,  
02:35PM 8 YOUR HONOR, AND WITHOUT AN EXTRA ELEMENT, THEY CANNOT GET  
02:35PM 9 AROUND THE COPYRIGHT INFRINGEMENT PREEMPTION PROBLEM. AND THEY  
02:35PM 10 HAVE NOT ALLEGED THAT EXTRA ELEMENT WITH RESPECT TO THEIR TORT  
02:36PM 11 CLAIMS.

02:36PM 12 NOW, IN THE OPPOSITION BRIEF THEY ARGUED AT SOME LENGTH, I  
02:36PM 13 BELIEVE FOUR OR FIVE PAGES, YOUR HONOR, THAT THE BREACH OF  
02:36PM 14 CONTRACT CLAIMS WERE NOT PREEMPTED. WELL, THAT'S A RED  
02:36PM 15 HERRING. WE HAVE NOT ALLEGED AT THIS STAGE OF THE PROCEEDINGS  
02:36PM 16 THAT THE BREACH OF CONTRACT CLAIMS ARE PREEMPTED BY COPYRIGHT,  
02:36PM 17 AND THEY FAILED TO ADDRESS THE TORT CLAIMS.

02:36PM 18 IT COULD BE, YOUR HONOR, THAT AT SOME LATER STAGE IN THE  
02:36PM 19 PROCEEDING WE MIGHT RAISE THAT ARGUMENT, BUT WE ARE NOT RAISING  
02:36PM 20 IT NOW.

02:36PM 21 YOUR HONOR, THAT LEAVES ONLY THE BREACH OF CONTRACT CLAIM.

02:36PM 22 YOUR HONOR, YOUNG VERSUS FACEBOOK, THE OTHER CASES WE'VE  
02:36PM 23 CITED, A NUMBER OF THEM IN OUR REPLY BRIEF SAY YOU HAVE TO  
02:36PM 24 CONJOIN THE ACT OR OMISSION WITH THE PROVISION THAT YOU SAY IT  
02:36PM 25 VIOLATES. IT'S A PRETTY STRAIGHTFORWARD REQUIREMENT,

02:36PM 1 YOUR HONOR. IT IS NOT MET HERE, AND THAT'S REALLY SIGNIFICANT  
02:37PM 2 BECAUSE IF WE LOOK AT THESE OPEN SOURCE LICENSES, THERE'S  
02:37PM 3 NOTHING IN THE OPEN SOURCE LICENSES PROHIBITING SOMEONE FROM  
02:37PM 4 TRAINING A MACHINE LEARNING MODEL ON THE BASIS OF THIS CODE,  
02:37PM 5 AND THERE'S NOTHING --

02:37PM 6 THE COURT: WELL, YOU KNOW, I HAVE TO SAY, THAT  
02:37PM 7 PHRASE THAT YOU JUST USED PERMEATES THESE BRIEFS, AND I DON'T  
02:37PM 8 THINK -- AND YOU CAN KEEP DOING THAT IF YOU WANT, BUT THIS CASE  
02:37PM 9 IS NOT JUST ABOUT TRAINING.

02:37PM 10 IF THE TRAINING HAD OCCURRED AND THEN NOTHING ELSE, THIS  
02:37PM 11 CASE WOULD NOT BE HERE. SO THEMATICALLY AS A WAY OF SORT OF  
02:37PM 12 HANGING THE MEAT ON THE BONES, I JUST CAN'T -- I HAVE TROUBLE  
02:37PM 13 GETTING THERE.

02:37PM 14 MS. HURST: YOUR HONOR, I THINK THAT'S AN EXCELLENT  
02:37PM 15 POINT. I THINK ACTUALLY ONE OF THE PROBLEMS HERE IS THAT WE  
02:37PM 16 DON'T UNDERSTAND WHETHER THE CASE IS ABOUT TRAINING AT ALL,  
02:37PM 17 WHETHER IT'S ABOUT TRAINING AND OUTPUT BOTH OR IT'S ONLY ABOUT  
02:37PM 18 OUTPUT.

02:37PM 19 AND I THINK THAT'S A VERY SIGNIFICANT ISSUE, YOUR HONOR,  
02:38PM 20 FOR US TO UNDERSTAND TO WHICH ACTIVITY TRAINING OR OUTPUT EACH  
02:38PM 21 OF THESE CLAIMS IS ADDRESSED.

02:38PM 22 YOUR HONOR, JUST FOR EXAMPLE, IN COUNT ONE PLAINTIFFS  
02:38PM 23 ALLEGE THAT THE CREATION OF DERIVATIVE WORKS BASED UPON  
02:38PM 24 LICENSED MATERIAL IS THE MODEL ITSELF, NOT JUST THE OUTPUT.

02:38PM 25 AND THAT -- THOSE ALLEGATIONS ARE REPEATED THROUGHOUT

02:38PM 1 OTHER CLAIMS.

02:38PM 2 SO THERE'S A LACK OF CLARITY HERE, YOUR HONOR, ABOUT WHAT  
02:38PM 3 IS THE ULTIMATE THEORY. IS IT TRAINING? IS IT OUTPUT? IS IT  
02:38PM 4 BOTH?

02:38PM 5 YOUR HONOR, THAT ALSO POINTS OUT THE SIGNIFICANCE OF NOT  
02:38PM 6 ONLY THE LACK OF ALLEGATION THAT THEIR CODE IS LIKELY TO BE  
02:38PM 7 OUTPUT, BUT THE SEEMINGLY CONTRARY ALLEGATION THAT THERE ARE  
02:39PM 8 1 PERCENT OF THE TIME MATCHES IN EXCESS OF 150 CHARACTERS.

02:39PM 9 YOUR HONOR, LET'S JUST LOOK AT HOW THOSE COME ABOUT. IN  
02:39PM 10 THE STORY OF THE COMPLAINT A SOFTWARE DEVELOPER INSTALLS  
02:39PM 11 COPILOT IN THEIR CODE EDITOR. THEY'RE TYPING ALONG, AND  
02:39PM 12 THEY'RE USING THEIR OWN CODING AS A PROMPT, THAT'S PARAGRAPH  
02:39PM 13 46. YOUR HONOR, THE EDITOR IS IN PARAGRAPH 47.

02:39PM 14 AND AS A RESULT OF STATISTICAL PATTERNS THAT COPILOT HAS  
02:39PM 15 DISCERNED, IT WILL MAKE SUGGESTIONS THAT ARE THE MOST LIKELY  
02:39PM 16 COMPLETION. YOUR HONOR, THAT'S IN PARAGRAPHS 53 AND 79.

02:39PM 17 SO WHAT WE HAVE, YOUR HONOR, IS A TOOL THAT BY PLAINTIFFS'  
02:40PM 18 OWN THEORY OUTPUTS ONLY THE MOST LIKELY SUGGESTIONS BASED ON  
02:40PM 19 THE USER'S INTENDED OBJECTIVES FOR THEIR CODING. AND THERE ARE  
02:40PM 20 NO FACTS IN THE COMPLAINT, YOUR HONOR, TO SUGGEST WHY THAT  
02:40PM 21 WOULD EVER RESULT IN THE PLAINTIFFS' CODE BEING OUTPUT AS A  
02:40PM 22 SUGGESTION.

02:40PM 23 YOUR HONOR, THAT'S EVEN ASSUMING THAT A SHORT MATCH WOULD  
02:40PM 24 BE INFRINGING WHICH OF COURSE IS A DUBIOUS ASSUMPTION IN LIGHT  
02:40PM 25 OF THE THIN COPYRIGHT THAT IS CORDED TO SOFTWARE AND THE



02:40PM 1 SIGNIFICANT FAIR USE ISSUES OF GOOGLE VERSUS ORACLE.

02:40PM 2 SO, YOUR HONOR, THIS OMITTED COPYRIGHT CLAIM AND THE LACK  
02:40PM 3 OF CLARITY ABOUT WHETHER PLAINTIFFS ARE PLEADING TRAINING,  
02:40PM 4 OUTPUT OR BOTH LEAVES DEFENDANTS GITHUB AND MICROSOFT WITHOUT A  
02:41PM 5 CLEAR UNDERSTANDING OF WHAT THE THEORY IS EXACTLY OF  
02:41PM 6 WRONGDOING.

02:41PM 7 AND, YOUR HONOR, ONE FINAL NOTE TO EMPHASIZE THE  
02:41PM 8 DIFFERENCE THAT -- THAT THERE IS A DIFFERENCE BETWEEN THE  
02:41PM 9 DEFENDANTS HERE. YOUR HONOR, MICROSOFT IS NOT ALLEGED TO HAVE  
02:41PM 10 DONE ANYTHING HERE OTHER THAN TO BE A CORPORATE INVESTOR OR  
02:41PM 11 PARENT AND A SUPPLIER OF THE AZURE PLATFORM. SINCE  
02:41PM 12 JUDGE WHYTE DECIDED THE NETCOM CASE BACK IN THE '90'S, IT'S NOT  
02:41PM 13 BEEN SUFFICIENT TO NAME SOMEBODY AS A DEFENDANT SIMPLY BECAUSE  
02:41PM 14 THEY WERE AN ISP, YOUR HONOR, NOR CAN THERE BE DISREGARD OF THE  
02:41PM 15 CORPORATE FORMALITIES WITHOUT SOME ALLEGATIONS TO SUGGEST THAT  
02:41PM 16 MICROSOFT ITSELF IS INVOLVED IN THE ACTS THAT ARE ALLEGED TO BE  
02:41PM 17 UNLAWFUL. SO FOR THAT REASON AS WELL, YOUR HONOR, MICROSOFT  
02:41PM 18 AND GITHUB SHOULD BE DISMISSED BASED ON THE CURRENT PLEADING.

02:41PM 19 AND UNLESS THE COURT HAS QUESTIONS, I'LL RESERVE  
02:41PM 20 ADDITIONAL TIME FOR REBUTTAL.

02:42PM 21 THE COURT: I DON'T HAVE QUESTIONS. THANKS.

02:42PM 22 THE DEFENDANTS HAVE 6 MINUTES AND 30 SECONDS REMAINING.

02:42PM 23 MR. SAVERI, THERE YOU ARE. I'M GOING TO TAKE YOU UP TO  
02:42PM 24 30 MINUTES FROM 26. THERE WASN'T REALLY HARDLY ANY OVERLAP  
02:42PM 25 BETWEEN WHAT THE DEFENDANTS DID, AND I WANT YOU TO HAVE ENOUGH

02:42PM 1 TIME TO REBUT EVERYTHING YOU'VE HEARD SO FAR BEFORE THEY STAND  
02:42PM 2 UP AGAIN.

02:42PM 3 SO WHENEVER YOU AND YOUR TEAM ARE READY, YOU CAN BEGIN.

02:42PM 4 MR. SAVERI: CAN WE HAVE ONE MINUTE JUST TO  
02:42PM 5 ORGANIZE?

02:42PM 6 THE COURT: YES. I WILL SAY TYPICALLY PEOPLE DO  
02:42PM 7 THAT WHILE THE OTHER SIDE IS TALKING, BUT YOU CAN PROCEED  
02:42PM 8 WHENEVER YOU'RE READY.

02:42PM 9 MR. SAVERI: YOUR HONOR, THANK YOU.

02:42PM 10 JUST TO GIVE YOU BY WAY OF A PREVIEW THE WAY THAT I THINK  
02:43PM 11 WE'RE GOING TO RESPOND IS FIRST TO ADDRESS THE STANDING ISSUE,  
02:43PM 12 AND THEN THE 1202(B) ISSUE, AND THEN THE UNFAIR COMPETITION  
02:43PM 13 PREEMPTION ISSUE, AND THEN NEGLIGENCE, AND THEN BREACH OF  
02:43PM 14 CONTRACT, AND THAT'S WHAT WE'RE GOING TO FOCUS ON BY WAY OF A  
02:43PM 15 ROAD MAP.

02:43PM 16 THE COURT: OKAY.

02:43PM 17 MR. SAVERI: THE FIRST THING I'D LIKE TO DO IS YOU  
02:43PM 18 ASKED ME A QUESTION ABOUT THE PII INFORMATION.

02:43PM 19 THE COURT: I DID.

02:43PM 20 MR. SAVERI: WE WOULD LIKE TO REPLEAD THAT AND FOCUS  
02:43PM 21 ON THAT, SO THAT'S OUR POSITION.

02:43PM 22 THE COURT: SUCH LEAVE WILL BE GRANTED.

02:43PM 23 MR. SAVERI: THANK YOU, YOUR HONOR.

02:43PM 24 SO LET ME FIRST ADDRESS THE ISSUE I THINK WHICH IS A  
02:43PM 25 STANDING ISSUE.

02:43PM 1 THE DEFENDANTS CITED BIRDSONG AS THEIR BEST CASE.

02:43PM 2 BIRDSONG REALLY DOESN'T WORK, YOUR HONOR, IN FACT, SOME OF THE  
02:44PM 3 ALLEGATIONS THAT MS. HURST JUST CITED.

02:44PM 4 WHEN THE SOFTWARE OPERATES, WHAT IT NEEDS TO DO IS THAT IT  
02:44PM 5 NEEDS TO LOOK AT ALL THE TRAINING DATA IN ORDER TO FUNCTION.  
02:44PM 6 AND WHEN IT DOES THAT, IT IDENTIFIES, AS WE SAY IN  
02:44PM 7 PARAGRAPH 53, IT IDENTIFIES THE MOST STATICALLY LIKELY  
02:44PM 8 COMPLETION BASED ON THE EXAMPLES IT REVIEWED IN TRAINING.

02:44PM 9 EVERY INSTANCE OF OUTPUT FROM CODEX IS DERIVED FROM  
02:44PM 10 MATERIAL IN THE TRAINING DATA.

02:44PM 11 SO IN ORDER FOR THE PRODUCT TO WORK AND THE WAY IT WAS  
02:44PM 12 DESIGNED TO WORK, IT LOOKS AT ALL OF THE DATA.

02:44PM 13 THE COURT: OKAY. SO LET'S FOCUS JUST ON THAT FOR A  
02:44PM 14 MOMENT, THE TRAINING ASPECT.

02:44PM 15 I HAVE A HARD TIME SEEING HOW THE TRAINING -- ALL OF THIS  
02:44PM 16 STUFF IS PUBLICALLY AVAILABLE, RIGHT? ALL OF THE -- IF I WERE  
02:45PM 17 TO REGISTER WITH GITHUB AND ESTABLISH AN ACCOUNT --

02:45PM 18 MR. SAVERI: YES.

02:45PM 19 THE COURT: -- COULD I LOOK AT ALL OF THE MATERIAL  
02:45PM 20 THAT IS AT PLAY IN YOUR COMPLAINT?

02:45PM 21 MR. SAVERI: YES, SUBJECT TO THE LICENSE AGREEMENTS.

02:45PM 22 THE COURT: RIGHT. OKAY. BUT THE LICENSE  
02:45PM 23 AGREEMENTS DON'T RESTRICT MY LOOKING AT IT. I HAVE SOME  
02:45PM 24 DIFFICULTY IN UNDERSTANDING HOW THE TRAINING ASPECT OF THIS  
02:45PM 25 PRODUCT INJURES ANYBODY'S RIGHTS, BECAUSE IF JON TIGAR CAN GET

02:45PM 1 A GITHUB ACCOUNT AND GO ON AND READ ALL OF IT UNTIL HIS HEART'S  
02:45PM 2 CONTENT, WHY CAN'T A SOFTWARE PROGRAM DO THE SAME THING? WHY  
02:45PM 3 DOES THAT VIOLATE ANY RIGHT?

02:45PM 4 MR. SAVERI: AND, YOUR HONOR, WHAT WE ARE FOCUSSED  
02:45PM 5 IS ON THE USE.

02:45PM 6 THE COURT: RIGHT. GOOD. OKAY. GOOD.

02:45PM 7 MR. SAVERI: AND THAT'S, THAT'S -- AND IT'S THE USE  
02:46PM 8 OF IT IN DEROGATION OF THE LICENSES WHICH IS AT THE CORE OF OUR  
02:46PM 9 CLAIM.

02:46PM 10 THE COURT: THE REASON I JUMPED IN IS BECAUSE YOU  
02:46PM 11 STARTED BY SAYING, WELL, IT'S GOING TO TRAIN ON ALL OF THEM.

02:46PM 12 BUT THEN I ASSUMED THAT YOU WERE GOING TO SAY, YES, THE  
02:46PM 13 OUTPUT MAY BE ONLY SOME OF IT, BUT THE TRAINING IS ON ALL OF  
02:46PM 14 IT.

02:46PM 15 BUT IF THE TRAINING IS NOT WRONGFUL, I JUST WONDER WHAT  
02:46PM 16 DOES IT MATTER THAT IT'S TRAINING ON ALL OF IT?

02:46PM 17 LET'S SAY THAT YOU CAME TO ME AND YOU SAID, HEY, I NEED  
02:46PM 18 HELP IN LEARNING HOW TO FIX A CAR, AND I TURN TO MY BOOKSHELF  
02:46PM 19 AND I HAVE THREE BOOKS UP THERE. I HAVE ONE ON HOW TO BUILD  
02:46PM 20 YOUR OWN BARBECUE, OKAY? I HAVE GOT ONE ON HOW TO FLY A  
02:46PM 21 GLIDER, AND I HAVE ONE ON HOW TO FIX A CAR. I'VE READ ALL OF  
02:46PM 22 THEM, BUT I GIVE YOU THE ONE THAT IS ABOUT HOW TO FIX A CAR.  
02:46PM 23 AND YOU'RE LIKE, COOL, I'M GOING TO WRITE MY OWN MANUAL NOW.  
02:47PM 24 WHATEVER JUST HAPPENED, IT DOESN'T HAVE ANYTHING TO DO -- MAYBE  
02:47PM 25 I LET YOU READ ALL THREE OF THEM. THIS IS A HORRIBLE ANALOGY,

02:47PM 1 WE CAN JUST START WITH THAT. BUT IT'S ONLY THE OUTPUT THAT IS  
02:47PM 2 GOING TO MATTER. NO INJURY IS DONE TO WHOEVER CREATED THESE  
02:47PM 3 OTHER WORKS THAT IS ABOUT SOMETHING ELSE. I'LL STOP BUT  
02:47PM 4 HOPEFULLY I'M MAKING MYSELF MODERATELY CLEAR.

02:47PM 5 MR. SAVERI: YOU ARE, YOUR HONOR, AND THIS TOUCHES  
02:47PM 6 ON SOME OF THE CONTRACT POINTS.

02:47PM 7 MR. BUTTERICK: YES, YOUR HONOR, AND IT ALSO TOUCHES  
02:47PM 8 ON SOME OF THE --

02:47PM 9 THE COURT: COUNSEL, YOU NEED TO START BY SAYING  
02:47PM 10 YOUR NAME.

02:47PM 11 MR. BUTTERICK: EXCUSE ME. THIS IS  
02:47PM 12 MATTHEW BUTTERICK, COCOUNSEL FOR THE PLAINTIFFS HERE.

02:47PM 13 I'M A LONG, LONG TERM MEMBER OF THE OPEN SOURCE COMMUNITY  
02:47PM 14 AND AN OPEN SOURCE PROGRAMMER IN ADDITION TO BEING A LAWYER.

02:47PM 15 I THINK THE ANSWER TO YOUR QUESTION HERE IS THAT WHEN AN  
02:47PM 16 AI TRAINS, IT'S NOT MERELY LOOKING, IT'S NOT MERELY READING,  
02:47PM 17 IT'S COPYING. AND THERE'S A LONG HISTORY IN THE LITERATURE OF  
02:47PM 18 CHARACTERIZING AI TRAINING AS A FORM OF COMPRESSION, COMPRESSED  
02:47PM 19 COPYING AND THAT IS FED INTO THIS TRAINING AND INTO THE NEURAL  
02:48PM 20 NETWORK. SO REALLY WHAT IS IMPRINTED INTO THE NEURAL NETWORK  
02:48PM 21 IS A SORT OF COPY, AND WE REALLY HAVE TO SEE IT THAT WAY. SO  
02:48PM 22 IT'S QUITE DIFFERENT FROM READING.

02:48PM 23 AND AS TO YOUR POINT ABOUT ASKING FOR JUST ONE BOOK OUT OF  
02:48PM 24 MANY, I REALLY THINK THAT'S A -- I MEAN, I CAN SEE WHY THAT  
02:48PM 25 MIGHT BE THE INTUITIVE URGE, BUT I DON'T THINK THAT'S HOW

02:48PM 1 COPILOT WORKS. COPILOT IS A NEURAL NETWORK. IT'S ONE BIG MASS  
02:48PM 2 OF TRAINING DATA THAT HAS BEEN IMPRINTED ON THIS SOFTWARE  
02:48PM 3 ARTIFACT THAT IS THE RESULT, AGAIN, OF HAVING COPIED ALL OF  
02:48PM 4 THIS TRAINING DATA.

02:48PM 5 AND WHEN YOU AS A USER STEP UP TO COPILOT AND QUERY IT, IT  
02:48PM 6 NEEDS TO ACTUALLY GO THROUGH ALL OF THAT DATA RIGHT IN THAT  
02:48PM 7 MOMENT, AND THAT'S WHY THESE SYSTEMS ARE SO EXPENSIVE AND  
02:48PM 8 DIFFICULT TO RUN TO FIGURE OUT WHAT IT IS THAT WOULD BE  
02:48PM 9 RESPONSIVE IN THAT MOMENT.

02:48PM 10 SO AGAIN WHAT COPILOT --

02:48PM 11 THE COURT: DOES THE ACT OF COPYING -- DOES THE ACT  
02:48PM 12 OF COPYING ITSELF INTO THE NEURAL NETWORK BY ITSELF VIOLATIVE  
02:49PM 13 OF ANY OF THE GITHUB LICENSES?

02:49PM 14 MR. BUTTERICK: WELL, I THINK, YOUR HONOR, WE HEAR  
02:49PM 15 ABOUT THIS FROM --

02:49PM 16 THE COURT: I'M GOING TO STOP YOU. I CAN'T WAIT FOR  
02:49PM 17 THE EXPLANATION, BUT THE QUESTION ITSELF WAS A YES OR NO  
02:49PM 18 QUESTION.

02:49PM 19 MR. BUTTERICK: I THINK THE ANSWER IS YES AS LONG AS  
02:49PM 20 YOU FOLLOW THE TERMS OF THE LICENSES.

02:49PM 21 THE COURT: WHAT TERM OF A LICENSE? WHAT TERM OF  
02:49PM 22 ANY LICENSE ATTACHED TO THE COMPLAINT? WHAT PLACES ANY  
02:49PM 23 OBLIGATIONS ON THE TRAINING PORTION?

02:49PM 24 MR. BUTTERICK: WELL, WE, WE -- WHAT WE'RE POINTING  
02:49PM 25 OUT HERE IS THAT THE SUGGESTED LICENSES WE TALK ABOUT ALL

02:49PM 1 CONTAIN ATTRIBUTION REQUIREMENTS. SO WE CAN'T TAKE A VERY,  
02:49PM 2 VERY DETAILED POSITION ON THE OPERATION INTERNALLY OF COPILOT  
02:49PM 3 BECAUSE WE DON'T HAVE ACCESS TO THAT. BUT OUR VIEW IS, AS THE  
02:49PM 4 DEFENDANTS NOTED, THE COPILOT MODEL ITSELF IS AN ARTIFACT IN  
02:49PM 5 PART DERIVED FROM COPYING THIS MATERIAL AND OBVIOUSLY EVERY  
02:49PM 6 OUTPUT, AS WE PLEAD, IS DERIVED FROM THE MATERIAL.

02:50PM 7 THE COURT: WELL, I'M GOING TO STICK WITH MY  
02:50PM 8 QUESTION, BECAUSE THAT'S WHAT I LIKE TO DO.

02:50PM 9 MR. BUTTERICK: ALL RIGHT.

02:50PM 10 THE COURT: SO WE'RE FOCUSSING ON TRAINING. I ASKED  
02:50PM 11 YOU DOES IT VIOLATE ANY OF THE TERMS OF THESE LICENSES AND YOU  
02:50PM 12 SAID THE LICENSES HAVE AN ATTRIBUTION REQUIREMENT WHICH IS  
02:50PM 13 FEATURED PROMINENTLY IN THE COMPLAINT.

02:50PM 14 DOES THE -- HOW DOES IT VIOLATE THE ATTRIBUTION  
02:50PM 15 REQUIREMENT IF THE -- IF AS YOU ALLEGE COPILOT COPIES  
02:50PM 16 EVERYTHING IT FINDS AND THEN PUTS IT ON THE NEURAL NETWORK?  
02:50PM 17 I'LL STICK WITH THAT QUESTION, HOW DOES IT VIOLATE THE  
02:50PM 18 ATTRIBUTION REQUIREMENT?

02:50PM 19 MR. BUTTERICK: HOW DOES THAT ACT ALONE VIOLATE THE  
02:50PM 20 ATTRIBUTION REQUIREMENT ONCE IT'S UP IN THE MODEL LIFE?  
02:50PM 21 PERHAPS IT DOESN'T.

02:50PM 22 THE COURT: RIGHT. I THINK THE PARTY IN THIS CASE,  
02:50PM 23 CERTAINLY YOU KNOW A LOT MORE ABOUT THIS THAN I DO, AND THAT'S  
02:50PM 24 GOING TO BE TRUE AS LONG AS WE HAVE THIS CASE TODAY. I'M NOT A  
02:50PM 25 DATA SCIENTIST, AND I'M NOT A SOFTWARE DEVELOPER. BUT I

02:51PM 1 JUST -- I THINK THE PARTY IN THIS CASE -- AND WHERE IS THE  
02:51PM 2 PARTY? THE PARTY IS IN THE DISTRIBUTION OR REDISTRIBUTION PART  
02:51PM 3 OF THE CASE. I'M JUST HAVING TROUBLE SEEING HOW THIS IS GOOD  
02:51PM 4 FOR YOU, BUT I'LL STOP THERE BECAUSE I DON'T WANT TO BURN MORE  
02:51PM 5 OF YOUR TIME.

02:51PM 6 MR. SAVERI: SO I -- THANK YOU, YOUR HONOR.

02:51PM 7 ANSWERING THE QUESTION YOU ASKED TO THE DEFENDANTS ABOUT  
02:51PM 8 WHAT THE BEST CASE IS, ON THE STANDING WE WOULD POINT YOU TO  
02:51PM 9 THE GOOGLE RTB CASE WHICH IS JUDGE GONZALEZ ROGERS' CASE.

02:51PM 10 HERE WE BELIEVE THAT THE COMPLAINT DOES ALLEGE SUFFICIENT  
02:51PM 11 FUTURE INJURY TO SATISFY THE INJURY IN FACT REQUIREMENT. THE  
02:51PM 12 THREAT OF FUTURE HARM IS REAL. WE KNOW THAT FROM THE  
02:52PM 13 ALLEGATIONS THAT WE'VE BEEN DISCUSSING.

02:52PM 14 WE KNOW THAT THE FACT THAT THE SCRAPING HAS OCCURRED SHOWS  
02:52PM 15 THAT THE HARM IS LIKELY AND IT IS REAL, AND THAT IS SUFFICIENT  
02:52PM 16 UNDER ARTICLE III AND UNDER THE CASES IN THE NINTH CIRCUIT  
02:52PM 17 INCLUDING KROTTNER THAT INTERPRET IT.

02:52PM 18 THE COURT: I'LL SAY THAT I DON'T THINK MR. GRATZ  
02:52PM 19 DENIED -- HE'S KEEPING HIS POWDER DRY, BUT HE CHOSE TODAY NOT  
02:52PM 20 TO DENY THAT YOUR COMPLAINT SAYS THAT THE HARM IS VERY, VERY  
02:52PM 21 LIKELY TO OCCUR TO SOMEBODY. THAT'S NOT THE FIGHT HE WANTS TO  
02:52PM 22 HAVE TODAY.

02:52PM 23 THE FIGHT HE WANTS TO HAVE IS WHY IS IT LIKELY TO HAPPEN  
02:52PM 24 TO YOUR NAMED PLAINTIFFS? I COULD COME UP WITH ANOTHER  
02:52PM 25 TERRIBLE ANALOGY. I'LL TRY TO KEEP IT BRIEF.



02:52PM 1 LET'S SAY THAT I'VE WRITTEN SOFTWARE AND I PUT IT ON  
02:52PM 2 GITHUB. IT DOESN'T WORK, FIRST OF ALL, AND IT'S DIRECTED AT A  
02:53PM 3 FIELD OR APPLICATION THAT NO ONE CARES ABOUT.

02:53PM 4 SO IT'S JUST INCREDIBLY UNLIKELY THAT ANYONE IS GOING TO  
02:53PM 5 COME ON GITHUB AND THAT ANYONE IS GOING TO -- EXCUSE ME, GOING  
02:53PM 6 TO INSTALL THIS PRODUCT AND THAT COPILOT IS GOING TO SUGGEST MY  
02:53PM 7 SOFTWARE TO ANYBODY BECAUSE IT'S TERRIBLE SOFTWARE THAT NO ONE  
02:53PM 8 WANTS. THAT'S HIS ARGUMENT.

02:53PM 9 WHAT IS YOUR RESPONSE TO IT?

02:53PM 10 MR. SAVERI: WELL, YOUR HONOR, WE SAY THAT'S  
02:53PM 11 INCONSISTENT WITH THE ALLEGATIONS IN OUR COMPLAINT, THE  
02:53PM 12 WELL-PLED ALLEGATIONS THAT IT IS IN FACT -- WE KNOW THAT NONE  
02:53PM 13 OF THE OUTPUT CONTAINS THE ATTRIBUTION THAT IS REQUIRED UNDER  
02:53PM 14 THE LICENSE. THERE'S REAL ECONOMIC HARM FROM THAT, AND WE KNOW  
02:53PM 15 THAT HAPPENS FROM EVERY CASE, AND THAT'S SUFFICIENT UNDER  
02:53PM 16 ARTICLE III AT THIS POINT, AT THIS POINT IN THE PROCEEDINGS AS  
02:54PM 17 OPPOSED TO A CASE LIKE TRANSUNION, FOR EXAMPLE, WHERE THERE WAS  
02:54PM 18 A TRIAL AND THERE WAS A DISCOVERY AND EXPLICATION OF THESE  
02:54PM 19 ISSUES.

02:54PM 20 SO GIVEN WHERE WE ARE IN THE PROCEEDING AND THE  
02:54PM 21 SUFFICIENCY OF THE ALLEGATIONS AND I THINK THE LIKELIHOOD ON  
02:54PM 22 THE CERTAINTY THAT THE ATTRIBUTION, THE LICENSED MATERIAL, THE  
02:54PM 23 ATTRIBUTION AND OTHER COPYRIGHTED INFORMATION IS NOT ATTACHED,  
02:54PM 24 THAT'S SUFFICIENT AT THIS JUNCTURE.

02:54PM 25 SO I'D LIKE TO PASS THE BATON, AND I WOULD LIKE TALK ABOUT

02:54PM 1 1202(B) .

02:54PM 2 THE COURT: SURE.

02:54PM 3 MR. YOUNG: GOOD AFTERNOON, YOUR HONOR.

02:54PM 4 CHRISTOPHER YOUNG ON BEHALF OF THE PLAINTIFFS.

02:54PM 5 SO I WANT TO TALK ABOUT SECTION 1202(B) AND JUST DIRECTLY  
02:54PM 6 RESPOND TO THE POINTS THAT DEFENDANTS MADE STARTING WITH THE  
02:54PM 7 IDENTICALITY POINT. THERE ARE A COUPLE OF POINTS I WANT TO  
02:54PM 8 MAKE HERE.

02:54PM 9 FIRST, I THINK SOFTWARE CODE IS DIFFERENT. THERE ARE  
02:54PM 10 CASES THAT HAVE RECOGNIZED THAT SOFTWARE CODE ITSELF CAN BE  
02:55PM 11 CMI. THERE'S THIS CASE CALLED BOUNCE EXCHANGE CASE CITED IN  
02:55PM 12 OUR BRIEF THAT EXPLAINS THAT HOW FOR PROGRAMMERS EMBEDDING CMI  
02:55PM 13 WITHIN THE CODE ITSELF CAN BE DONE. SO IF THERE'S A VIOLATION  
02:55PM 14 OF THE DMCA, BY DEFINITION IF THAT CMI IS REMOVED, PART OF THE  
02:55PM 15 CODE ITSELF IS REMOVED, THAT COPY WILL NOT BE IDENTICAL BY  
02:55PM 16 DEFINITION.

02:55PM 17 I ALSO THINK THAT DEFENDANTS ARE TRYING TO READ INTO THE  
02:55PM 18 DMCA AN IDENTICALITY REQUIREMENT THAT IS NOT PRESENT IN THE  
02:55PM 19 DMCA. WE CAN LOOK AT FROST-TSUJI, THE LINE VIRTUALLY IDENTICAL  
02:55PM 20 POINT -- I APOLOGIZE. I WILL TRY TO SLOW IT DOWN.

02:55PM 21 SO READING FROST-TSUJI ITSELF, THE PORTION THAT DEFENDANTS  
02:55PM 22 DRAW YOUR ATTENTION TO, VIRTUAL IDENTICAL PLANS AT ISSUE IN  
02:55PM 23 FROST-TSUJI WERE ARCHITECTURAL DRAWINGS. SO THIS IS QUOTING  
02:55PM 24 WHAT THE COURT SAID IN FROST-TSUJI, "VIRTUALLY IDENTICAL PLANS  
02:56PM 25 COULD HAVE BEEN CREATED BY RECREATING FROST-TSUJI'S PLANS AND

02:56PM 1 NOT INCLUDING FROST-TSUJI'S COPYRIGHT MANAGEMENT INFORMATION."

02:56PM 2 SIMILARLY, IN DOLLS KILL, ANOTHER CASE CITED BY THE  
02:56PM 3 DEFENSE, THAT CASE WAS TALKING ABOUT A REASONABLE INFERENCE  
02:56PM 4 THAT COULD NOT BE DRAWN BECAUSE OF THE TWO SIMILAR -- I BELIEVE  
02:56PM 5 IT WAS BRACELETS IN THAT CASE.

02:56PM 6 IN THIS CASE WE KNOW THAT THE AI'S INGESTED EXACT COPIES,  
02:56PM 7 THAT'S AN ALLEGATION THAT WHEN THE AI -- WHEN THE MODELS  
02:56PM 8 INGESTED ALL OF THE CODE, THEY MADE EXACT COPIES, INCLUDING THE  
02:56PM 9 LICENSES.

02:56PM 10 NOW, WE KNOW THIS IS WHAT THEY HAVE DONE BECAUSE AS WE  
02:56PM 11 HAVE ALLEGED IN THE COMPLAINT, EARLIER VERSIONS OF BOTH CODEX  
02:56PM 12 AND COPILOT WERE SPITTING OUT OUTPUT WITH THE ASSOCIATED  
02:56PM 13 LICENSES ATTACHED. THAT MEANS AT SOME POINT IT WAS WITHIN THE  
02:56PM 14 BLOCK BOX OF THE MODEL AND THE OUTPUT, THE LICENSES WERE BEING  
02:56PM 15 SPIT OUT WITH THE OUTFIT THAT THEY WERE ASSOCIATED WITH AND AT  
02:56PM 16 SOME POINT SOMEONE MADE THE DECISION TO ALTER THAT.

02:56PM 17 NOW, THAT GOES INTO MY NEXT POINT, YOUR HONOR, THE  
02:56PM 18 KNOWLEDGE REQUIREMENT AND THE SCIENTER REQUIREMENT.

02:57PM 19 SO WE AGREE THAT STEVENS IS CONTROLLING IN THIS CASE, BUT  
02:57PM 20 WE DO, WITH THE GLOSS THAT AT A MOTION TO DISMISS, ALL WE HAVE  
02:57PM 21 TO DO IS PLAUSIBLY ALLEGE KNOWLEDGE. I THINK COUNSEL HAS  
02:57PM 22 ACKNOWLEDGED THAT, AND WE CERTAINLY AGREE.

02:57PM 23 THE COURT: COUNSEL, I HAVE A FEELING I'M NOT -- I  
02:57PM 24 CAN'T PREDICT THE FUTURE, BUT I THINK IT'S LIKELY THE COURT  
02:57PM 25 REPORTER IS GOING TO ASK YOU TO SLOW DOWN AGAIN.

02:57PM 1 MR. YOUNG: I APOLOGIZE, YOUR HONOR.

02:57PM 2 THE COURT: AND I ALSO WANT TO SAY, IT'S VERY COMMON  
02:57PM 3 FOR LAWYERS TO SAY "I'LL TRY TO DO BETTER," BUT ONCE IT'S BEEN  
02:57PM 4 BROUGHT TO YOUR ATTENTION TWICE, "TRY" IS USUALLY NOT GOOD  
02:57PM 5 ENOUGH.

02:57PM 6 MR. YOUNG: YES, YOUR HONOR.

02:57PM 7 THE COURT: YES.

02:57PM 8 MR. YOUNG: I WILL TRY TO CALM MY URGES.

02:57PM 9 I WANT TO JUST FOCUS IN ON THE SCIENTER REQUIREMENT. SO  
02:57PM 10 WE HEARD COUNSEL SAY TODAY THAT GITHUB SUPPORTS SCOPE AND  
02:57PM 11 SOURCE. I THINK THEREIN LIES THE PROBLEM. AS WE ALLEGE IN OUR  
02:57PM 12 COMPLAINT, AND THIS IS PARAGRAPH 34, FOOTNOTE 4. GITHUB  
02:57PM 13 PROVIDES USERS, PROGRAMMERS THE OPPORTUNITY TO JUST SELECT  
02:58PM 14 WHICH LICENSES TO UPLOAD. NOW, 11 OF THESE LICENSES, WHICH WE  
02:58PM 15 REFER TO AS THE SUGGESTED LICENSES, CARRY WITH THEM THE  
02:58PM 16 RESTRICTIONS THAT ARE AT ISSUE IN THIS CASE.

02:58PM 17 WE HAVE ALLEGED WE HAVE -- GITHUB PROVIDES LICENSES THAT  
02:58PM 18 DO NOT CARRY THESE RESTRICTIONS, SO GITHUB KNOWS WHAT IT HAS TO  
02:58PM 19 DO TO RESPECT THESE OPEN SOURCE LICENSES. SO WHEN IT INGESTS  
02:58PM 20 THESE CODES, AND WHEN CODEX AND COPILOT INGESTS THESE LICENSES  
02:58PM 21 AND THEN SPITS OUT THE OUTPUT WITHOUT THE ATTRIBUTION, WITHOUT  
02:58PM 22 RESETTING THE COPYRIGHT NOTICES, WITHOUT REPRODUCING THE  
02:58PM 23 LICENSED TEXT IN VIOLATION OF THOSE OPEN SOURCE LICENSES, THEY  
02:58PM 24 KNOW WHAT THEY'RE DOING, YOUR HONOR.

02:58PM 25 NOW, HOW ELSE DO WE KNOW THAT -- OR HOW ELSE HAVE WE

02:58PM 1 ALLEGED THE REQUISITE KNOWLEDGE IN THIS CASE?

02:58PM 2 NOW, IT'S IMPORTANT TO REMEMBER THAT THESE AI'S, THESE  
02:58PM 3 MODELS ARE NOT WRITING THEIR OWN CODE. THEY ARE MERELY  
02:58PM 4 COPYING, AND THEY ARE MERELY COPYING AND PARROTING WHAT THEY  
02:59PM 5 HAVE SEEN. WE KNOW THAT 1 PERCENT OF THE TIME BY THE  
02:59PM 6 DEFENDANTS' OWN ADMISSION THEY ARE REPRODUCING EXACT COPIES OF  
02:59PM 7 CODE THAT THEY HAVE INGESTED AND SEEN. THAT IS NOT AN  
02:59PM 8 ALLEGATION. THAT IS SOMETHING THAT THEY HAVE THEMSELVES HAVE  
02:59PM 9 PUT INTO THE WILD.

02:59PM 10 SO THIS IS ALSO NOT A CASE LIKE STEVENS VERSUS CORELOGIC.  
02:59PM 11 WE REALLY INTERROGATE WHAT THE PROGRAM IN STEVENS WAS DOING.  
02:59PM 12 THAT PROGRAM IN STEVENS WAS DOWNSIZING THE IMAGES. BY ALL  
02:59PM 13 PARTIES' AGREEMENT IN THAT CASE, THE PROGRAM AT ISSUE IN  
02:59PM 14 STEVENS COULD NOT READ THE META DATA AT ISSUE IN THAT CASE. IN  
02:59PM 15 THIS CASE, AS WE ALLEGE, THE COPILOT KNOWS THAT IT IS INGESTING  
02:59PM 16 LICENSES AND IT KNOWS NOT TO SPIT THAT OUT.

02:59PM 17 SOME PROGRAMMER MADE THE DECISION TO ALTER IT. WE KNOW  
02:59PM 18 THIS BECAUSE EARLIER VERSIONS OF COPILOT WAS SPITTING OUT THE  
02:59PM 19 ASSOCIATED LICENSES WITH THE CODE.

03:00PM 20 NOW, I WANT TO BRIEFLY TOUCH ON THIS INFRINGEMENT POINT.

03:00PM 21 SO I THINK THAT -- SO THERE IS AMPLE CASE LAW THAT SAYS  
03:00PM 22 THAT COPYRIGHT INFRINGEMENT IS NOT AN ELEMENT OF THE DMCA.  
03:00PM 23 THERE'S A COURT FROM THE -- THERE'S A DIAMONDBACK INDUSTRY  
03:00PM 24 DECISION THAT RECOGNIZES THAT VIOLATIONS OF THE DMCA ARE NOT  
03:00PM 25 PREDICATED ON AN INFRINGEMENT CLAIM. THESE ARE ALL 1202 CASES,

03:00PM 1 YOUR HONOR.

03:00PM 2 THERE'S ALSO THIS MEDICAL BROADCAST CASE OUT OF THE  
03:00PM 3 EASTERN DISTRICT OF PENNSYLVANIA IN 2003 WHICH SAYS QUOTE,  
03:00PM 4 "NOTHING IN SECTION 1202 OF THE DMCA SUGGESTS THAT REGISTRATION  
03:00PM 5 IS A PRECONDITION TO A LOSS. WHILE COPYRIGHT REGISTRATION IS A  
03:00PM 6 PREREQUISITE UNDER 17 U.S.C. SECTION 411(A) FOR AN ACTION OF  
03:00PM 7 COPYRIGHT INFRINGEMENT, CLAIMS UNDER THE DMCA, HOWEVER, ARE  
03:00PM 8 SIMPLY NOT COPYRIGHT INFRINGEMENT CLAIMS AND ARE SEPARATE AND  
03:00PM 9 DISTINCT FROM THE LETTER."

03:00PM 10 SO I DO NOT THINK THAT WE NEED TO PROVE OR ALLEGE  
03:00PM 11 UNDERLYING INFRINGEMENT IN ORDER TO PLAUSIBLY ALLEGE A DMCA  
03:00PM 12 CLAIM.

03:01PM 13 NOW, YOUR HONOR, I DO WANT TO TOUCH BRIEFLY ON THIS SECOND  
03:01PM 14 LEVEL SCIENTER. WE RECOGNIZE THAT STEVENS HAS TWO LEVELS OF  
03:01PM 15 KNOWLEDGE THAT ARE REQUIRED.

03:01PM 16 SO THIS CASE IS SIMILAR TO OTHER CASES INVOLVING SOFTWARE  
03:01PM 17 IN WHICH A PARTY STRIPS A LICENSE FROM A SOURCE CODE. THERE'S  
03:01PM 18 A CASE OUT OF THIS DISTRICT, A 2020 CASE, THIS NEO4J CASE  
03:01PM 19 VERSUS GRAPH FOUNDATION CASE CITED IN OUR BRIEF WHICH INVOLVED  
03:01PM 20 A PIECE OF CODE WHICH HAD ITS LICENSE REPLACED WITH AN OPEN  
03:01PM 21 SOURCE LICENSE AND THEN PUBLISHED ONTO GITHUB. THAT WAS  
03:01PM 22 SUFFICIENT FOR A DMCA CLAIM, SUFFICIENT TO SHOW THAT A  
03:01PM 23 LIKELIHOOD OF DISTRIBUTION AND KNOWLEDGE OF DISTRIBUTION.  
03:01PM 24 THERE WAS SIMILARLY A CASE ON A MOTION TO DISMISS. AND WE  
03:01PM 25 BELIEVE OUR ALLEGATIONS ARE HERE. WE KNOW THAT CODEX AND

03:01PM 1 COPILOT HAVE INGESTED ALL OF OUR PLAINTIFF'S AND CLASS MEMBER'S  
03:01PM 2 CODE AND IT IS -- CODEX AND COPILOT, THE ENTIRE POINT OF CODEX  
03:01PM 3 AND COPILOT IS TO DISTRIBUTE THE CODE THAT IT -- UPON WHICH OUR  
03:02PM 4 PLAINTIFF'S AND CLASS MEMBER'S CODE IS BASED.

03:02PM 5 NOW, YOUR HONOR, UNLESS YOU HAVE ANY QUESTIONS ABOUT THE  
03:02PM 6 DMCA CLAIM, I WOULD LIKE TO TOUCH BRIEFLY ON THE PREEMPTION  
03:02PM 7 ARGUMENTS?

03:02PM 8 THE COURT: NO. PLEASE GO AHEAD.

03:02PM 9 MR. YOUNG: OKAY. SO BRIEFLY, I THINK I HEARD  
03:02PM 10 COUNSEL HAS -- IS NO LONGER CHALLENGING THE PREEMPTION FOR THE  
03:02PM 11 BREACH OF CONTRACT CLAIM, SO I WILL NOT TALK ABOUT THAT.

03:02PM 12 SO I THINK WE -- WITH RESPECT TO THE OTHER COMMON LAW  
03:02PM 13 STATE LAW CLAIMS, THE EXTRA ELEMENT THAT I THINK WE CONTEND ALL  
03:02PM 14 FLOW FROM THE OPEN SOURCE LICENSES. SO THERE ARE -- THERE'S  
03:02PM 15 AMPLE CASE LAW RECOGNIZING THAT OPEN SOURCE LICENSES ARE UNIQUE  
03:02PM 16 IN THAT THEY IMPOSE EXTRA OBLIGATIONS THAT ARE NOT COEXTENSIVE  
03:02PM 17 WITH COPYRIGHT CLAIMS. AND I THINK JACOBSON VERSUS KATZER,  
03:02PM 18 BOTH A DISTRICT COURT CASE AND THE FEDERAL CIRCUIT CASE  
03:02PM 19 APPLYING NINTH CIRCUIT LAW, FULLY EXPLAIN HOW THE INJURIES ARE  
03:03PM 20 DIFFERENT.

03:03PM 21 YOUR HONOR, I BELIEVE I AM RUNNING OUT OF TIME SO I'LL  
03:03PM 22 BRIEFLY PASS IT ON TO CO-COUNSEL FOR BREACH OF CONTRACT CLAIMS.

03:03PM 23 THE COURT: I THINK YOU ARE -- AS I TOLD MR. SAVERI,  
03:03PM 24 I'M GOING TO GIVE PLAINTIFFS 30 MINUTES, AND I THINK YOU HAVE  
03:03PM 25 ALMOST 10 MINUTES REMAINING.

03:03PM 1 MR. BUTTERICK: EXCELLENT. I WILL PASS ON UNLESS  
03:03PM 2 YOUR HONOR HAS ANY QUESTIONS ABOUT THE PREEMPTION ARGUMENT?

03:03PM 3 THE COURT: I DON'T.

03:03PM 4 MR. YOUNG: THANK YOU, YOUR HONOR.

03:03PM 5 MR. BUTTERICK: HELLO, YOUR HONOR.

03:03PM 6 MATTHEW BUTTERICK AGAIN.

03:03PM 7 QUICKLY, I JUST WANTED TO GIVE YOU A BETTER ANSWER TO YOUR  
03:03PM 8 QUESTION BEFORE THAT I FUMBLE A LITTLE BIT.

03:03PM 9 ONE OF OUR PLAINTIFFS, IT'S DOE 3 ALLEGED AND MENTIONED IN  
03:03PM 10 PARAGRAPH 19 USES GNU AFFERO LICENSE. AND IF YOU LOOK AT THAT  
03:03PM 11 DOCUMENT 11 ON ECF PAGE 26, IT HAS A -- THIS IS TO YOUR  
03:03PM 12 QUESTION ABOUT DO ANY OF THE LICENSES PROHIBIT TRAINING? AND I  
03:03PM 13 WOULD SAY THAT THE AFFERO LICENSE ARGUABLY DOES PROHIBIT  
03:03PM 14 TRAINING BECAUSE IT HAS A PROVISION ABOUT REMOTE NETWORK  
03:04PM 15 INTERACTION THAT SAYS IF YOU MAKE SOMETHING THAT IS A MODIFIED  
03:04PM 16 VERSION OF THE SOURCE, FOR INSTANCE, WE COULD ARGUE AN AI  
03:04PM 17 MODEL, AND YOU PUT IT -- AND YOU LET OTHER USERS INTERACT WITH  
03:04PM 18 IT REMOTELY THROUGH A COMPUTER NETWORK, YOU NEED TO LET THOSE  
03:04PM 19 USERS RECEIVE THE CORRESPONDING SOURCE CODE.

03:04PM 20 SO, AGAIN, THAT IS AN OBLIGATION THAT ATTACHES --

03:04PM 21 THE COURT: BUT DOESN'T THE REMOTE NETWORK CONTACT  
03:04PM 22 THAT YOU JUST IDENTIFIED OCCUR DURING THE DISTRIBUTION PART OF  
03:04PM 23 THE PROGRAM, NOT THE TRAINING PART?

03:04PM 24 THE TRAINING PART OCCURS, I'M ASSUMING, WITHIN WHAT IS  
03:04PM 25 ESSENTIALLY A SEALED ENVELOPE METAPHORICALLY.



03:04PM 1 MR. BUTTERICK: WELL, THAT MAY BE SO. I THINK WHAT  
03:04PM 2 THE AFFERO LICENSE IS SAYING IS THAT ONCE YOU PUSH THAT MODEL  
03:04PM 3 UP ONTO SOMETHING LIKE MICROSOFT AS YOUR SERVERS, EVEN BEFORE  
03:04PM 4 IT OUTPUTS A SINGLE BIT OF CODE, ATTRIBUTION AND SOURCE CODE,  
03:04PM 5 THE OBLIGATIONS HAVE ATTACHED.

03:04PM 6 I DON'T WANT TO SPEND TOO MUCH TIME WITH THAT. I JUST  
03:04PM 7 WANT TO BRING THAT TO YOUR ATTENTION BECAUSE THAT'S A LICENSE  
03:04PM 8 THAT IS AT ISSUE TODAY.

03:05PM 9 AS FOR THE BREACH OF CONTRACT -- ARE WE STILL HERE? ALL  
03:05PM 10 RIGHT. THANK YOU.

03:05PM 11 WE HEARD A LOT FROM THE DEFENDANTS ABOUT COPYRIGHT  
03:05PM 12 INFRINGEMENT AND FAIR USE, WHICH IS INTERESTING TO ME BECAUSE  
03:05PM 13 OF COURSE AS THEY ALSO NOTED, THERE IS NO COPYRIGHT  
03:05PM 14 INFRINGEMENT CLAIM HERE. THIS IS -- I THINK PART OF THAT IS  
03:05PM 15 BECAUSE, AGAIN AS A LONG-TIME OPEN SOURCE PROGRAMMER, THESE  
03:05PM 16 LICENSES ARE ACTUALLY VERY SPECIFIC AND IN WAYS VERY LIMITED  
03:05PM 17 BECAUSE EVEN THOUGH THEY SEEM TO BE VERY PERMISSIVE, AGAIN,  
03:05PM 18 IT'S ONLY IF YOU ADHERE TO THE OBLIGATION, SO THEY'RE JUST AS  
03:05PM 19 LEGAL, JUST AS BINDING, AND JUST AS CONSEQUENTIAL AS, YOU KNOW,  
03:05PM 20 MICROSOFT'S LICENSE FOR WINDOWS.

03:05PM 21 SO AS TO THE PROVISIONS HERE, BOTH DEFENDANTS SAY THAT WE  
03:05PM 22 NEVER ALLEGE WHICH LICENSE, IF ANY, WAS BREACHED. THIS ISN'T  
03:05PM 23 TRUE. AND IN PARAGRAPHS 1 AND 4 WE SAY THAT THE MATERIALS OF  
03:05PM 24 THE PLAINTIFFS WERE MADE AVAILABLE ON GITHUB SUBJECT TO  
03:05PM 25 LICENSES.

03:05PM 1 IN PARAGRAPH 34 WE TALK ABOUT THESE SET OF 11 LICENSES  
03:06PM 2 CALLED THE SUGGESTED LICENSES, AND WE ATTACH THEM TO EXHIBIT A.  
03:06PM 3 SO, THEREFORE, THE DEFENDANTS ARE ON NOTICE OF ALL OF THE TERMS  
03:06PM 4 UNDER RULE OF CIVIL PROCEDURE 10(C) AND THE KNEVELBOARD VERSUS  
03:06PM 5 ESPN CASE.

03:06PM 6 NOW, IF THE COURT WISHES, WE CAN GO THROUGH AND, YOU KNOW,  
03:06PM 7 APPLY PIN CITES AND SHOW EXACTLY WHERE THE ATTRIBUTION  
03:06PM 8 REQUIREMENTS IN EACH OF THOSE 11 ARE, AT THE SAME TIME THE  
03:06PM 9 DEFENDANTS IN THIS CASE ARE ALL EXPERIENCED OPEN SOURCE  
03:06PM 10 DEVELOPERS AND PUBLISHERS IN THEIR OWN RIGHT, THEY USE MANY OF  
03:06PM 11 THESE LICENSES FOR THEIR OWN WORK, SO IT WOULD SEEM THAT THEY  
03:06PM 12 WOULD KNOW ALL OF THIS AS WELL.

03:06PM 13 AS TO THE ISSUES OF WHETHER THE LICENSES PROHIBIT ANY  
03:06PM 14 TRAINING, AGAIN, I JUST WANT TO EMPHASIZE THAT THE LICENSE, ALL  
03:06PM 15 OF THE BENEFITS UNDER THESE LICENSES ARE CONTINGENT ON THE  
03:06PM 16 PERFORMANCE OF THE OBLIGATIONS, AND IF YOU DON'T PLAN TO  
03:07PM 17 PERFORM THOSE OBLIGATIONS, YOU DON'T GET ANY RIGHTS AT ALL, AND  
03:07PM 18 THEN IT'S SOFTWARE PIRACY JUST LIKE ANYTHING ELSE.

03:07PM 19 YOU KNOW, AS FAR AS THE MICROSOFT AND GITHUB'S CONTENTION  
03:07PM 20 THAT THIS PRODUCT COPILOT MAKES LIFE BETTER FOR SOFTWARE  
03:07PM 21 DEVELOPERS, IT REALLY DOESN'T.

03:07PM 22 THE COURT: YOU DON'T NEED TO WORRY ABOUT THAT.  
03:07PM 23 THAT'S NOT AN ELEMENT OF A CLAIM OR A DEFENSE. I'M NOT EVEN  
03:07PM 24 SURE THAT THAT WAS INTENDED FOR ME. I MEAN, IT MAY HAVE BEEN.  
03:07PM 25 IT IS JUST A SORT OF SET THE TABLE KIND OF DEAL. I THINK

03:07PM 1 COMMENTS LIKE THAT WERE INTENDED FOR THE WIDER AUDIENCE.

03:07PM 2 MR. BUTTERICK: ALL RIGHT. FAIR ENOUGH.

03:07PM 3 IF YOU HAVE NO OTHER QUESTIONS ON THE BREACH OF CONTRACT,  
03:07PM 4 I'LL JUST TOUCH ON THE TORTUOUS INTERFERENCE, YOUR HONOR.

03:07PM 5 THE COURT: ALL RIGHT.

03:07PM 6 MR. BUTTERICK: I MEAN, I THINK THAT WE CAN  
03:07PM 7 DEFINITELY IMPROVE THE PLEADING HERE AND WE WOULD LIKE TO ASK  
03:07PM 8 LEAVE TO AMEND THAT CLAIM WITH MORE FACTS.

03:07PM 9 THE COURT: I THINK YOU'RE LIKELY TO RECEIVE SUCH  
03:07PM 10 LEAVE.

03:07PM 11 MR. BUTTERICK: ALL RIGHT. THANK YOU. THAT'S ALL  
03:08PM 12 I'LL SAY THEN.

03:08PM 13 MR. SAVERI: YOUR HONOR, JOSEPH SAVERI AGAIN ON  
03:08PM 14 BEHALF OF THE PLAINTIFFS.

03:08PM 15 THE NEXT I GUESS CAUSE OF ACTION I'D LIKE TO TALK ABOUT IS  
03:08PM 16 THE NEGLIGENCE CAUSE OF ACTION.

03:08PM 17 WE'VE ALLEGED SUFFICIENTLY THE EXISTENCE OF THE DUTY THAT  
03:08PM 18 GIVES RISE TO OUR NEGLIGENCE CLAIM. IN PARTICULAR, WE'VE  
03:08PM 19 ALLEGED THE FACTS SUPPORTING A SPECIAL RELATIONSHIP, IN  
03:08PM 20 PARTICULAR HANDLING THE CONFIDENTIAL DATA. WE'VE ALLEGED THAT.

03:08PM 21 WE'VE ALSO ALLEGED THE FORESEEABLE HARM THAT IS A  
03:08PM 22 CONSEQUENTIAL, AND, IN FACT, INTENTIONAL RESULT OF THE BREACH  
03:08PM 23 OF THAT DUTY.

03:08PM 24 THE COURT: THE TOUGH ONE FOR YOU HERE IS SHOWING AN  
03:08PM 25 INJURY IN FACT. SO WE'VE ABOUT SOME DEBATE IN THIS HEARING

03:08PM 1 ABOUT FUTURE INJURY AND WHETHER I MIGHT FIND THAT THERE WAS A  
03:09PM 2 SUFFICIENT ALLEGATION OF FUTURE INJURY OR LIKELIHOOD OF FUTURE  
03:09PM 3 INJURY SUFFICIENT TO GIVE RISE TO STANDING TO SEEK INJUNCTIVE  
03:09PM 4 RELIEF. BUT IF WE'RE GOING TO TALK ABOUT NEGLIGENCE, FOR  
03:09PM 5 EXAMPLE, THAT DOESN'T HAVE TO DO WITH FUTURE INJURY. AND  
03:09PM 6 THAT'S DEPENDENT, AS MANY OF THE CLAIMS ARE, ON WHETHER YOUR  
03:09PM 7 PARTICULAR NAMED PLAINTIFFS HAVE SUFFERED A CONCRETE INJURY IN  
03:09PM 8 FACT AND AS TO THAT I SORT OF HAVE MY DOUBTS. SO THAT MIGHT BE  
03:09PM 9 WHAT YOU -- YOU MIGHT WANT TO ADDRESS THAT POINT.

03:09PM 10 MR. SAVERI: WELL, WHAT I WOULD DIRECT THE COURT'S  
03:09PM 11 ATTENTION TO IS THE JACOBSON CASE WHICH TALKS ABOUT THE DAMAGE  
03:09PM 12 THAT COMES FROM THE BREACH OF A LICENSE, AND WE THINK THAT  
03:09PM 13 BASED ON THAT THAT WE SUFFICIENTLY ALLEGED THE INJURY IN FACT.

03:09PM 14 THE COURT: I'M NOT SURE THE QUESTION IS BEFORE ME  
03:10PM 15 TODAY, BUT I WILL NONETHELESS GO OUT ON A LIMB AND SAY IF YOU  
03:10PM 16 COULD SHOW THE FACT OF A BREACH, THEN I THINK I COULD PROBABLY  
03:10PM 17 AT THE 12(B) (6) STAGE PRESUME ENOUGH HARM TO YOUR CLIENTS TO  
03:10PM 18 SHOW THAT THERE'S BEEN AN INJURY IN FACT.

03:10PM 19 THE ISSUE IS WHAT THE DEFENDANTS SAY IS THAT YOU HAVE NOT  
03:10PM 20 SHOWN THAT THERE HAS BEEN SUCH A BREACH, THAT AT BEST, AND  
03:10PM 21 AGAIN, I'M JUST TELLING YOU WHAT THE PLAINTIFFS' ARGUMENT IS,  
03:10PM 22 EXCUSE ME, THE DEFENDANTS' ARGUMENT IS, WHAT THEY'RE SAYING IS  
03:10PM 23 THAT YOU HAVEN'T ALLEGED EVEN THE LIKELIHOOD OF AN ACTUAL  
03:10PM 24 BREACH THAT OCCURRED SOME TIME IN THE PAST.

03:10PM 25 AND SO WE'VE BEEN HAVING A FIGHT TODAY, SO FAR, IS THERE A

03:10PM 1 SUFFICIENT ALLEGATION OF LIKELIHOOD OF INJURY IN THE FUTURE?

03:10PM 2 BUT WHAT THEY'RE SAYING IS THAT THESE NAMED PLAINTIFFS,

03:10PM 3 WHERE IS IT IN THERE THAT THEY CAN SAY, YES, THEY TOOK OUR CODE

03:10PM 4 AND USED IT WITHOUT OUR PERMISSION?

03:10PM 5 AND MR. GRATZ HOPEFULLY IS NODDING OCCASIONALLY SO THAT

03:10PM 6 TELLS ME THAT I AM --

03:10PM 7 MR. SAVERI: SO, YOUR HONOR, A COUPLE OF RESPONSES.

03:11PM 8 I DO THINK JACOBSON SAYS THAT DAMAGE TO THE CREATION AND

03:11PM 9 DISTRIBUTION OF COPYRIGHTED WORKS UNDER PUBLIC LICENSES COULD

03:11PM 10 INCLUDE INJURY TO REPUTATION AND THE PROGRAMMERS RECOGNITION IN

03:11PM 11 ITS PROFESSION AS WELL AS THE IMPACT ON THE LIKELIHOOD THAT THE

03:11PM 12 PRODUCT WILL BE FURTHER IMPROVED.

03:11PM 13 THE COURT: MR. SAVERI, YOU HAVE ABOUT A MINUTE AND

03:11PM 14 A HALF.

03:11PM 15 MR. SAVERI: THANK YOU.

03:11PM 16 JUST ON THAT NOTE, YOUR HONOR, IF THE COURT BELIEVES OR

03:11PM 17 CONCLUDES THAT WE HAVE NOT SUFFICIENTLY ALLEGED THAT DUTY AND

03:11PM 18 PARTICULARLY ADDRESSED THAT ISSUE, WE WOULD LIKE LEAVE TO AMEND

03:11PM 19 CERTAINLY TO DO THAT, SO WE WOULD LIKE THAT OPPORTUNITY.

03:11PM 20 THE COURT: YOU'RE LIKELY TO RECEIVE SUCH AN

03:11PM 21 OPPORTUNITY.

03:11PM 22 MR. SAVERI: THANK YOU, YOUR HONOR.

03:11PM 23 WITH THAT, I DON'T HAVE ANYTHING ELSE. LET ME JUST CHECK.

03:12PM 24 (PAUSE IN PROCEEDINGS.)

03:12PM 25 MR. SAVERI: YOUR HONOR, AT THIS POINT WE'RE IN AN

03:12PM 1 INTERESTING SITUATION BECAUSE WE BELIEVE THAT WE COULD PLEAD  
03:12PM 2 THESE FACTS SPECIFICALLY WITH RESPECT TO THE UNNAMED OR PSEUDO  
03:12PM 3 ANONYMOUS PLAINTIFFS. WE WERE RELUCTANT TO DO THAT BECAUSE  
03:12PM 4 WERE WE TO DO THAT, THAT WOULD DISCLOSE THE IDENTITY. SO AMONG  
03:12PM 5 THE THINGS THAT WE WOULD AMEND TO ADD IS SPECIFIC ALLEGATIONS  
03:12PM 6 REGARDING OUR PLAINTIFFS WITH RESPECT TO THIS ISSUE.

03:12PM 7 THE COURT: I SEE. ALL RIGHT. WELL, YOU'RE THE  
03:12PM 8 CAPTAIN OF THAT SHIP. THOSE I THINK ARE DECISIONS TO MADE  
03:12PM 9 ENTIRELY ON COUNSEL'S SIDE OF THE BENCH.

03:13PM 10 MR. SAVERI: YOUR HONOR, IT WAS A LITTLE BIT OF A  
03:13PM 11 CHICKEN AND EGG THING BECAUSE WE HAVEN'T HAD THE OPPORTUNITY TO  
03:13PM 12 VENTILATE THIS ISSUE.

03:13PM 13 WITH THAT, I DO THINK I BUMPED UP AGAINST MY 30 MINUTES,  
03:13PM 14 AND SO I WILL SIT DOWN UNLESS THE COURT HAS ANY ADDITIONAL  
03:13PM 15 QUESTIONS.

03:13PM 16 THE COURT: I DON'T. THANK YOU, MR. SAVERI.

03:13PM 17 MR. GRATZ, I'LL COME BACK TO YOU. YOU AND MS. HURST HAVE  
03:13PM 18 SIX AND A HALF MINUTES TOGETHER IF WANT TO USE ANY PORTION OF  
03:13PM 19 THAT.

03:13PM 20 I JUST WILL NOTE THAT THERE WERE SOME POINTS THAT YOU AND  
03:13PM 21 MS. HURST MADE THAT WERE NOT ADDRESSED, SO I DON'T KNOW THAT  
03:13PM 22 YOU NEED REBUTTAL FOR ANY OF THOSE. BUT IF YOU WANT SOME  
03:13PM 23 REBUTTAL TIME, YOU HAVE IT.

03:13PM 24 MR. GRATZ: THANK YOU, YOUR HONOR. I WILL TURN IT  
03:13PM 25 OVER TO MS. HURST.

03:13PM 1 THE COURT: VERY GOOD. MS. HURST.

03:13PM 2 MS. HURST: THANK YOU, YOUR HONOR.

03:13PM 3 WITH REGARD TO THE LAST POINT, THE DISCUSSION OF THE  
03:13PM 4 NEGLIGENCE CLAIM, YOUR HONOR, THE WAY THAT CLAIM IS PLED IS  
03:13PM 5 THAT IT'S ABOUT PERSONAL DATA OR PERSONAL INFORMATION. IT  
03:13PM 6 APPEARS TO BE ONE OF THE PRIVACY BASED CLAIMS, AND SO IT  
03:14PM 7 SUFFERS FROM THE DEFECT THAT THE COURT NOTED EARLIER OF NOT  
03:14PM 8 HAVING IDENTIFIED ANY TYPE OF PERSONALLY IDENTIFYING  
03:14PM 9 INFORMATION OR PERSONAL DATA.

03:14PM 10 SINCE WE'RE TALKING ADMITTEDLY ON THE FACE OF THE  
03:14PM 11 COMPLAINT ABOUT GITHUB PUBLIC REPOSITORIES HERE, THAT'S PRETTY  
03:14PM 12 SIGNIFICANT. SO I BELIEVE PLAINTIFFS HAVE ALREADY REQUESTED  
03:14PM 13 LEAVE TO REPLEAD IT, BUT IN ANY EVENT IF THAT IS GOING TO  
03:14PM 14 CONTINUE TO BE A QUASI PRIVACY CLAIM THEN WE NEED TO UNDERSTAND  
03:14PM 15 THE ALLEGED PRIVACY INTEREST.

03:14PM 16 I WOULD ALSO SAY THAT WITH RESPECT TO CONTRACTUAL COUNTER  
03:14PM 17 PARTIES, YOUR HONOR, THERE IS LONGSTANDING CALIFORNIA LAW SINCE  
03:14PM 18 FOLEY VERSUS INTERACTIVE DATA OVERRULED SIEMENS DIRECT THAT YOU  
03:14PM 19 CAN'T TURN A BREACH OF CONTRACT CLAIM INTO A TORT CLAIM, SO  
03:14PM 20 THAT'S ANOTHER REASON WHY WE NEED TO UNDERSTAND WHAT THE THEORY  
03:14PM 21 OF THE CLAIM IS, WHAT IS THE DATA THAT IS AT ISSUE, WHAT IS THE  
03:14PM 22 ALLEGED NATURE OF THE RELATIONSHIP THAT IS SPECIAL, AND WHAT IS  
03:15PM 23 THE ACT OR OMISSION WITH RESPECT TO THAT INFORMATION. I'LL  
03:15PM 24 LEAVE IT AT THAT ON THE NEGLIGENCE CLAIM.

03:15PM 25 YOUR HONOR, THERE WAS A POINT THAT MR. YOUNG MADE WHEN HE

03:15PM 1 ARGUED THAT AN INFERENCE OF SCIENTER COULD ARISE FROM SOME  
03:15PM 2 ALLEGATIONS IN THE COMPLAINT ABOUT EARLIER ITERATIONS OF  
03:15PM 3 COPILOT REPRODUCING LICENSED TEXT. THAT'S IN PARAGRAPH 94,  
03:15PM 4 YOUR HONOR. AND IT'S CLEAR FROM THE ALLEGATION THAT COPILOT  
03:15PM 5 WAS SUGGESTING LICENSED TEXT AS A CODE COMPLETION.

03:15PM 6 WELL, OBVIOUSLY THAT DOESN'T MAKE ANY SENSE. SO THERE'S  
03:15PM 7 NOTHING THERE TO GIVE RISE TO AN INFERENCE THAT SOMEHOW  
03:15PM 8 SOMEBODY WHO IS DELIBERATELY STRIPPING LICENSE INFORMATION FOR  
03:15PM 9 SCIENTER PURPOSES.

03:16PM 10 IN THE PARLANCE OF THE COMPLAINT COPILOT SUGGESTED  
03:16PM 11 SOMETHING THAT HAD BEEN SEEN 700,000 DIFFERENT TIMES DURING  
03:16PM 12 TRAINING. INDEED, YOUR HONOR, THAT ALLEGATION SIMPLY  
03:16PM 13 REINFORCES THE OTHER ALLEGATIONS OF THE COMPLAINT THAT WHAT THE  
03:16PM 14 MODEL DOES IS INFER STATISTICAL PATTERNS AND IT SUGGESTS THE  
03:16PM 15 STATISTICALLY MOST LIKELY OUTCOMES AS COMPLETIONS.

03:16PM 16 AND TO THE HARM POINT, YOUR HONOR, THERE JUST AREN'T FACTS  
03:16PM 17 AND WE'VE HEARD NONE, WE'VE HEARD NONE IN ARGUMENT TODAY THAT  
03:16PM 18 WOULD SUGGEST THAT THESE PLAINTIFFS' CODE WOULD BE OUTPUT BY  
03:16PM 19 THE MODEL.

03:16PM 20 FINALLY, YOUR HONOR, I WOULD SAY THAT MR. BUTTERICK'S  
03:16PM 21 COMMENTS ABOUT HOW THE MODEL WORKED AND THE VARIOUS LICENSES  
03:16PM 22 UNDERSCORE THE REASON WHY WE NEED CLARITY WITH RESPECT TO ALL  
03:16PM 23 OF THE CLAIMS AS TO WHETHER TRAINING, OUTPUT OR BOTH ARE THE  
03:16PM 24 SUBJECT OF THEIR LEGAL THEORIES.

03:17PM 25 MR. BUTTERICK SEEMED TO SUGGEST ON SEVERAL OCCASIONS THAT



03:17PM 1 TRAINING IS THE BASIS FOR THEIR LEGAL THEORIES. AND IF THAT'S  
03:17PM 2 THE CASE, THEN IT SHOULD BE CLEARLY PRESENTED SO THAT WE CAN --  
03:17PM 3 THE COURT: I DON'T THINK YOU NEED TO TALK ABOUT  
03:17PM 4 THAT ANYMORE.

03:17PM 5 MS. HURST: ALL RIGHT. THANK YOU, YOUR HONOR.

03:17PM 6 THE COURT: I CONTINUE TO THINK THAT -- MISDIRECTION  
03:17PM 7 IS A STRONG WORD SO I WON'T USE IT, BUT THE DEFENDANT SPENT  
03:17PM 8 SOME TIME TRYING TO FOCUS ME ON TRAINING. THIS COMPLAINT IS  
03:17PM 9 NOT ABOUT TRAINING. IT JUST ISN'T, I DON'T THINK. I MEAN,  
03:17PM 10 MAYBE I'M JUST SAYING THIS TOO STRONGLY. I'LL PUT IT THIS WAY,  
03:17PM 11 IT'S NOT GOING TO BE THE SUBJECT OF A LOT OF WRITING BY THE  
03:17PM 12 COURT.

03:17PM 13 MS. HURST: ALL RIGHT. WELL, CERTAINLY, YOUR HONOR,  
03:17PM 14 WE WOULD AGREE IT SHOULD NOT BE ABOUT TRAINING.

03:17PM 15 YOUR HONOR, UNLESS THE COURT HAS OTHER QUESTIONS FOR  
03:17PM 16 MR. GRATZ OR ME, I THINK WE WOULD STOP THERE. I WOULD NOTE,  
03:17PM 17 YOUR HONOR, THAT THERE'S A HOUSEKEEPING ISSUE WITH RESPECT TO  
03:17PM 18 THE UPCOMING CASE MANAGEMENT CONFERENCE AS MR. GRATZ IS  
03:18PM 19 UNAVAILABLE ON THE 23RD AND THE PARTIES WOULD LIKE TO REQUEST  
03:18PM 20 THAT THAT BE MOVED TO ANOTHER DATE.

03:18PM 21 THE COURT: THAT'S FINE. HAVE YOU TALKED ABOUT THAT  
03:18PM 22 WITH MR. SAVERI ALREADY OR IS HE HEARING?

03:18PM 23 MR. SAVERI: YOUR HONOR, IF I MAY? JOSEPH SAVERI.

03:18PM 24 FROM OUR PERSPECTIVE THERE ARE TWO THINGS THAT ARE GOING  
03:18PM 25 ON WITH RESPECT TO THE CMC. WE'RE HAPPY TO MOVE THE CMC TO

03:18PM 1 ACCOMMODATE COUNSEL'S SCHEDULE, BUT WE THINK IT'S IMPORTANT  
03:18PM 2 THAT WE HAVE THE CMC. IT WAS ORIGINALLY SCHEDULED SOME TIME  
03:18PM 3 AGO AND IT'S SLIPPED SUBSTANTIALY. WE THINK IN A CASE LIKE  
03:18PM 4 THIS, CASE MANAGEMENT IS IMPORTANT, AND IT IS IMPORTANT TO --

03:18PM 5 THE COURT: MR. SAVERI.

03:18PM 6 MR. SAVERI: YES.

03:18PM 7 THE COURT: MR. SAVERI, I HAVE LIKE 400 CASES AND WE  
03:18PM 8 HAVE ALREADY SPENT ENOUGH TIME TALKING ABOUT WHETHER WE'RE  
03:18PM 9 GOING TO HAVE A CMC. I HEAR WHAT YOU'RE SAYING, BUT THIS IS  
03:18PM 10 HEARING TIME.

03:18PM 11 SO I'M HAPPY TO MOVE THE CMC. I DO WONDER WHETHER IT  
03:19PM 12 MAKES SENSE TO HAVE IT IF WE'RE ABOUT TO HAVE ANOTHER ROUND OF  
03:19PM 13 PLEADING AND MOTIONS, BUT I HEAR MR. SAVERI SAYING HE WANTS TO  
03:19PM 14 HAVE IT ANYWAY SO WE'LL HAVE IT.

03:19PM 15 WHAT'S A GOOD DATE?

03:19PM 16 MR. GRATZ: YOUR HONOR?

03:19PM 17 THE COURT: YES.

03:19PM 18 MR. GRATZ: LET ME BEGIN BY ANSWERING -- LET ME  
03:19PM 19 BEGIN --

03:19PM 20 THE COURT: ARE YOU GOING TO GIVE ME -- I REALLY  
03:19PM 21 DON'T WANT TO COME ACROSS AS BRUSK, BUT IF YOU'RE GOING TO DO  
03:19PM 22 SOMETHING OTHER THAN GIVE ME A GOOD DATE, I'M NOT SURE IT'S THE  
03:19PM 23 BEST USE OF EVERYONE'S TIME.

03:19PM 24 MR. GRATZ: THERE'S BEEN CORRESPONDENCE AMONGST  
03:19PM 25 COUNSEL, AND OF COURSE. WE HAVE DONE THIS WITH YOUR HONOR'S

03:19PM 1 AVAILABILITY AS WELL, AND IT LOOKS LIKE JUNE 20TH, 27TH OR  
03:19PM 2 JULY 11TH ARE THE DATES WHEN THE PARTIES ARE AVAILABLE.

03:19PM 3 I WOULD LIKE TO NOTE, WE THINK IN LIGHT OF THE AMENDMENT,  
03:19PM 4 WE DON'T THINK THE PARTIES SHOULD HAVE A 26(F) CONFERENCE AND  
03:19PM 5 OPEN DISCOVERY WHEN WE DON'T KNOW WHAT IS IN THE CASE.

03:19PM 6 THE COURT: WELL, THAT'S A VERY TYPICAL FIGHT TO  
03:20PM 7 HAVE. I THANK YOU FOR WAITING FOR ONE ROUND OF BRIEFING TO BE  
03:20PM 8 COMPLETED BEFORE HAVING THE FIGHT, BUT WE HAVE THIS FIGHT IN  
03:20PM 9 MANY CASES ALL OF THE TIME WHERE THE PLAINTIFFS WANT TO TRY TO  
03:20PM 10 GET SOME DISCOVERY AND THE DEFENDANTS SAY WE SHOULDN'T HAVE  
03:20PM 11 THAT. SOMETIMES WE WIND UP TALKING ABOUT THAT AND JUST  
03:20PM 12 RESOLVING IT AT THE CASE MANAGEMENT CONFERENCE. SOMETIMES I  
03:20PM 13 ASK PEOPLE FOR BRIEFS. I CAN'T SAY THAT MY OWN RULINGS ON THE  
03:20PM 14 SUBJECT ARE A MODEL OF CONSISTENCY. THERE'S SOME GUT INSTINCT  
03:20PM 15 THAT GOES INTO IT, BUT WE CAN -- IN THE LIKELY EVENT THAT YOU  
03:20PM 16 STILL ARE HAVING DISAGREEMENTS WITH THE PLAINTIFFS ABOUT THIS  
03:20PM 17 TOPIC, WE'LL JUST TALK ABOUT IT AT THE CONFERENCE.

03:20PM 18 MR. GRATZ: THANK YOU, YOUR HONOR.

03:20PM 19 MR. SAVERI: YOUR HONOR, EXCUSE ME.

03:20PM 20 THE COURT: YES.

03:20PM 21 MR. SAVERI: EXCUSE ME. WILL THE CMC BE DONE IN  
03:20PM 22 PERSON OR VIA ZOOM?

03:20PM 23 THE COURT: I HAVE NOT DONE A CMC -- WITH ONE  
03:20PM 24 EXCEPTION, WHICH OCCURRED YESTERDAY. IT'S A BIG INSTITUTIONAL  
03:21PM 25 REFORM CASE. I HAVE NOT DONE A CMC IN PERSON SINCE THE

03:21PM 1 PANDEMIC, BUT I WOULD CONSIDER IF THE PARTIES JOINTLY SENT A  
03:21PM 2 NOTE TO MS. LEE SAYING WE WOULD LIKE THE COURT TO HAVE IT IN  
03:21PM 3 PERSON AND IF THAT WERE A JOINT REQUEST, I WOULD CONSIDER THE  
03:21PM 4 REQUEST. BUT THAT'S SOMETHING THAT YOU SHOULD DO OFFLINE  
03:21PM 5 BECAUSE AS I AM TRYING TO SIGNAL TO YOU, I'M TRYING TO WRAP  
03:21PM 6 THIS UP. I WAS JUST TRYING TO FIND A DATE.

03:21PM 7 MS. HURST: YOUR HONOR, IF JULY 11TH IS AVAILABLE,  
03:21PM 8 THAT WAS A DATE THAT ALL PARTIES SAID WAS AVAILABLE.

03:21PM 9 MR. SAVERI: YOUR HONOR, WE WOULD LIKE JUNE 20TH.  
03:21PM 10 WE WOULD LIKE THE FIRST AVAILABLE DATE.

03:21PM 11 THE COURT: HERE'S WHAT WE'RE GOING TO DO RIGHT NOW.  
03:21PM 12 I'M GOING TO GO IN ORDER OF PRESENTATION TODAY. I'M GOING TO  
03:21PM 13 ASK MR. GRATZ ALL OF THE DATES THAT HE CAN LIVE WITH. I'M  
03:21PM 14 GOING TO ASK -- AND WHICH ONE IS HIS FAVORITE. AND MS. LEE IS  
03:21PM 15 GOING TO WRITE ALL OF THE DATES DOWN. AND NEXT TO HIS FAVORITE  
03:22PM 16 SHE'S GOING TO PUT THE INITIALS JG. I'M GOING TO REPEAT THE  
03:22PM 17 PROCESS WITH MS. HURST AND MR. SAVERI AND THEN AT THAT POINT  
03:22PM 18 THE HEARING WILL CONCLUDE AND THE MOTIONS WILL GO UNDER  
03:22PM 19 SUBMISSION.

03:22PM 20 MR. GRATZ, YOU HAVE THE FLOOR.

03:22PM 21 MR. GRATZ: THE DATES I'M AVAILABLE IN THE NEAR  
03:22PM 22 FUTURE THAT YOUR HONOR APPEARS TO BE AVAILABLE ARE JUNE 20TH,  
03:22PM 23 JUNE 27TH, JULY 11TH, AND JULY 18TH.

03:22PM 24 THE COURT: WHAT'S YOUR FAVORITE?

03:22PM 25 MR. GRATZ: I THINK THAT MY FAVORITE AMONG THOSE IS

03:22PM 1 JULY 18TH WITH THE SECOND PLACE BEING JULY 11TH.

03:22PM 2 THE COURT: WE DON'T HAVE SECOND PLACE.

03:22PM 3 MR. GRATZ: THEN MY FAVORITE IS JULY 11TH.

03:22PM 4 THE COURT: IT'S NOT HORSE SHOES.

03:22PM 5 MS. HURST, WHAT DATES ARE YOU AVAILABLE AND WHICH IS YOUR

03:22PM 6 FAVORITE?

03:22PM 7 MS. HURST: YOUR HONOR, I'M AVAILABLE ON JUNE 20TH,

03:22PM 8 27TH, AND JULY 11TH. I'M NOT AVAILABLE ON JULY 18TH. I WOULD

03:22PM 9 PREFER JULY 11TH.

03:22PM 10 THE COURT: SAME QUESTION, MR. SAVERI.

03:22PM 11 MR. SAVERI: THANK YOU, YOUR HONOR.

03:23PM 12 I'M AVAILABLE ON EVERY DAY MR. GRATZ SUGGESTED, AND MY

03:23PM 13 FAVORITE IS THE FIRST, I BELIEVE, WHICH WAS JUNE 20TH.

03:23PM 14 THE COURT: THANK YOU, COUNSEL. THESE MOTIONS ARE

03:23PM 15 UNDER SUBMISSION.

03:23PM 16 MR. GRATZ: THANK YOU, YOUR HONOR.

03:23PM 17 MR. SAVERI: THANK YOU, YOUR HONOR.

03:23PM 18 (COURT CONCLUDED AT 3:23 P.M.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT REPORTER OF THE  
UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF  
CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO  
HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, IS  
A CORRECT TRANSCRIPT FROM THE RECORD OF PROCEEDINGS IN THE  
ABOVE-ENTITLED MATTER.

A handwritten signature in black ink that reads "Irene Rodriguez". The signature is written in a cursive, flowing style with a large loop at the end of the last name.

IRENE RODRIGUEZ, CSR, RMR, CRR  
CERTIFICATE NUMBER 8074

DATED: MAY 6, 2023